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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Courts of Exchequer & Exchequer Chamber,

FROM

MICHAELMAS TERM, 7 WILL. IV.

TO

TRINITY TERM, 7 WILL. IV., BOTH INCLUSIVE;

WITH

TABLES OF THE CASES AND PRINCIPAL MATTERS.



BY

R. MEESON, Esq., AND W. N. WELSBY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTERS AT LAW.



VOL. II.



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JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honorable JAMES, Baron ABINGER,
Lord Chief Baron.

BARONS.

Sir JAMES PARKE, Knt.
Sir WILLIAM BOLLAND, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir JOHN GURNEY, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

ERRATA.

Page 2, line 22, for Court, read count.

4, line 8 from bottom, for 1819, read 1810.

5, line 6, for 1816, read 1810.

10, line 18, for Erle, read Maule.

371, line 16, after shew insert that.

397, line 17, for 1835, read 1836.

401, line 4 from bottom, for voluntary, read compulsory.

455, line 16, for Ashell, read Askeil.

521, line 6 from bottom, for a nonsuit, read arresting the judgment.

555, line 15, for wherever, read whether.

642, line 12 of marginal note, for act, read fact.

742, line 16, for plaintiff, read defendant.

The following errors were inadvertently left uncorrected in Vol. I.

Page 593, line 29, for brokers, read factors.

685, line 20, dele have; and for since, read before.

A

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REPORTS OF CASES
ARGUED AND DETERMINED
IN
The Courts of Exchequer,
AND
Exchequer Chamber.

MICHAELMAS TERM, 7 WILL. IV.

REGULA GENERALIS.

MICHAELMAS TERM, 7 WILL. IV. 3rd Nov. 1836.

1836.

IT is Ordered, that from and after the last day of this Term, all Rules upon Sheriffs, other than the Sheriffs of London and Middlesex, to return Writs either of mesne or final Process, and Rules to bring in the bodies of defendants, be Eight Day Rules, instead of Six Day Rules.

DENMAN,
N. C. TINDAL,
ABINGER,
J. A. PARK,
J. LITTLEDALE,
S. GASELEE,
J. VAUGHAN,
J. PARKE,

W. BOLLAND,
J. B. BOSANQUET,
E. H. ALDERSON,
J. PATTESON,
J. GURNEY,
J. WILLIAMS,
J. T. COLERIDGE.

Exch. of Pleas,
1836.

ROBERT TARBUCK, Administrator of JAMES TARBUCK,
Deceased, *v.* THOMAS BISPHAM.

A. kept cash with B., a banker, and the balances to his credit were stated from time to time in a pass-book. A. became a lunatic, but the account continued to be kept with his family, and in the pass-book, the entries in which were in B.'s handwriting; a balance was stated to the credit of A.:—*Held*, that this was not evidence to support a count on an account stated with A., in an action brought by his representative against B., to recover the amount of such balance.

ASSUMPSIT.—The first count of the declaration stated, that, whereas the said James Tarbuck in his lifetime, before the making of the promises by the defendant thereafter mentioned, had been in the habit of employing the defendant as his banker, and thereupon heretofore and in the lifetime of the said J. T., to wit, on the 1st August, 1810, in consideration that the said J. T., at the request of the defendant, would continue to employ him as his banker, and would, from time to time, deposit monies with him, the defendant, and employ him as such banker to receive such monies on his the said J. T.'s account and for his use, he, the defendant, promised the said J. T. to render to him, his executors or administrators, a just and true account of all monies which should be so deposited with or received by the defendant as aforesaid, and to pay to the said J. T., his executors or administrators, all such monies as aforesaid, together with interest, after the rate of *4l. per cent. per annum*, on the balances of such monies which should from time to time be in his, the defendant's hands, to the credit of the said J. T., &c., whenever thereunto reasonably requested. The Court then averred, that, on the day and year aforesaid, and for a long space of time, to wit, until the 1st day of November, 1812, the said J. T. did continue to employ the defendant as his banker, and deposit monies with him as such banker; and that the defendant, as such banker, and by virtue of such employment, received divers monies on account of the said J. T. and for his use, amounting in the whole to 1500*l.*, &c. &c.; and alleged as a breach, that the defendant did not render to the plaintiff, as administrator, after the death of the said J. T., or to J. T.

in his lifetime, a just and true account of the monies so received by and deposited with him as aforesaid, or pay the same or the interest thereon, or any part thereof. There were also counts on an account stated with the intestate, and on an account stated with the plaintiff as administrator.

Exch. of Pleas,
1836.

TARBUCK
v.
BISPHAM.

The defendant pleaded—First, non-assumpsit; secondly, to the first and second counts, that, after the making of the promises in those counts mentioned, and in the lifetime of the said J. T., to wit, on the 18th June, 1823, he, the defendant, did render a true and just account of all monies deposited with, and delivered by him, as in the first count mentioned, and of all monies due and owing from the defendant to the said J. T., to one W. Pilkington, who was then the agent of and for the said J. T. for that purpose duly authorized; and the defendant was then in arrear and indebted to J. T. on account of the promises in the first and second counts mentioned, in the sum of 175*l.* 14*s.* 5*d.*, and no more, for principal and interest, which sum the defendant then paid to the said W. P., then being such agent as aforesaid, in satisfaction of the said last-mentioned sum of money; and the said W. P., so being such agent and duly authorized as aforesaid, received the same from the defendant for and on account of the said J. T.; and that from the time of the rendering such account, and paying the said sum of money, he, the defendant, never had received any money from or on account of the said J. T., or of the plaintiff as administrator as aforesaid, nor had any money been deposited with him on account of the said J. T. or of the plaintiff as administrator as aforesaid. Thirdly, the defendant pleaded the statute of limitations to the whole declaration.

To the second plea the plaintiff replied, alleging that the account therein mentioned was not a true and just account; that the defendant was, at the time of rendering

Exch. of Pleas.
1836.

TARBUCK
v.
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it, in arrear in a larger sum than 175*l.* 14*s.* 5*d.*, and that W. P. was not an agent authorized by the plaintiff to receive the money on his behalf: on which issue was joined. The replication to the third plea stated, that the causes of action in the first and second counts mentioned, first accrued to the said J. T. in his lifetime, to wit, on the 1st January, 1823; and that before and at the time of the accruing of the causes of action in those counts mentioned, and of every of them, he, the said J. T., was non compos mentis, and continued to be so from the time of the accruing of the said causes of action until within six years next before the commencement of this suit, to wit, until the 4th September, 1831, on which day he died; and that he was never at any time after the accruing of the said causes of action, or either of them, of sane memory: which was denied by the rejoinder:—And as to the third count, the replication alleged that the cause of action in that count did accrue within six years: on which also issues were joined.

At the trial, before *Coleridge, J.*, at the last Liverpool Assizes, the following facts appeared in evidence:—

The intestate, James Tarbuck, who was a nail-maker at Prescott, in Lancashire, and possessed of some real property near that town, kept an account with William Bispham, father of the defendant, who carried on business as a private banker at Prescott. The pass-book kept between them was produced in evidence; it commenced in the year 1806, and was headed “Mr. James Tarbuck in account with William Bispham.” On the 12th August, 1819, the account shewed a balance, stated to Tarbuck’s credit, of 1039*l.* 19*s.* 2*d.*, and was signed by the defendant, Thomas Bispham, who, on his father’s death a short time before, had succeeded him in his business. The entries in this book were continued, in the defendant’s handwriting, without any fresh heading, balances being stated from time to time, down to the 23rd June, 1823. On that day there

appeared a balance to Tarbuck's credit of 175*l.* 14*s.* 5*d.*, and on the opposite page a receipt was given for that sum in the name of William Pilkington, as acting committee of the estate of James Tarbuck; but the defendant's signature appeared nowhere subsequent to the first statement of account in 1816. It appeared, that, in the year 1811, James Tarbuck became disordered in his mind, and was sent to a lunatic asylum; after remaining there a short time, he returned home, and continued free from restraint for about a year, when, being found to be altogether incompetent to manage his affairs, he was sent again to the asylum, and remained there a decided lunatic until his death in 1831. A commission of lunacy issued against him shortly after his second confinement, under which Pilkington was appointed committee of his estate and person. It did not distinctly appear to whom the pass-book used to be sent after Tarbuck became insane. The present action was brought pursuant to an order of the Court of Chancery, in a suit between the different members of the lunatic's family, in order to ascertain whether the payments made by the defendant were made bonâ fide for the benefit of the lunatic's estate, or by collusion with any other members of his family. The learned Judge stated it as his opinion, that the statute of limitations was a bar to the recovery of the first balance of 1039*l.* 19*s.* 2*d.*, inasmuch as it was not shewn that the lunacy of James Tarbuck existed at the time of that settlement of accounts; and that as to the subsequent balances, they were causes of action only on the footing of accounts stated; but, in order to state an account, there must be two parties of sane mind, whereas Tarbuck was, during all that time, insane. His Lordship was therefore of opinion, that there was no evidence to go to the jury in support of any of the causes of action, and directed the plaintiff to be called; and on the plaintiff's counsel appearing, the jury, under the direction of the learned Judge, found a verdict for the defendant.

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Atcherley, Serjt., now moved for a new trial, on the ground of misdirection. The learned Judge was wrong in ruling that the plaintiff could not recover on the account stated, under the circumstances proved at the trial. There is no authority to shew that either a lunatic or an infant might not himself sue for a debt contracted under such circumstances. They stand, in this respect, in the same situation; each may sue upon a contract made with him for his benefit, which yet might not be binding conversely upon him. [*Parke*, B.—The difficulty here is, that there is no *account stated*, but only a balance in the debtor's own book, which was not, and could not be, stated to the creditor. *Alderson*, B.—In the cases you refer to there is an actual contract, though one party was incompetent in law to make it]. There is an accounting here by the entry made in the book which passes between the banker and the customer, or those who represented him. An account stated with a married woman has been held sufficient to support an action by her husband, although it would not be evidence in an action against the husband. Bull. N. P. 129; *Styart v. Rowland* (a). [*Parke*, B.—That case proceeded on the principle that the wife may be treated as the husband's agent, it being an act done on his behalf and for his benefit, which may be subsequently ratified by him. Here there is no proof of a communication of the account to anybody]. It might equally be said that it was no account stated, if the account were rendered to a firm of which one partner was insane; and the objection would not be removed by treating it as stated with his agent, inasmuch as there must be a person of competent mind to appoint an agent. There is no case in which the disability of a lunatic is treated as differing in any degree from that of an infant. But for the state of mind of the party, it is as much an accounting with him as the entries in a banker's book would be an

(a) 1 Show. 215.

accounting with any customer. The same objection of incapacity, if it is to avail, would apply to a case where the lunatic was actually present, and appeared to go through the actual form of accounting; because it would be a mere mockery. In Co. Litt. 2. b., it is said, "A man of non-sane memory may, without the consent of any other, purchase lands, but he himself cannot waive it; but if he die in his madness, or after his memory recover, without agreement thereto, his heir may waive and disagree to the estate." And in Co. Litt. 166. a., "If any of the parceners be of non-sane memory, it shall bind the parties themselves, but not their issues, unless it be equal." The same broad ground of incapacity would equally apply to the cases there stated. In *Holt v. Ward* (a), it was held that an infant might sue on a contract of marriage with a person of full age. All the analogies to be derived from the authorities, and all the convenience and justice of the case, require that the action should be maintainable. The defendant has admitted a balance due to the *individual*, the lunatic, and ought not to be permitted to say that he was not in a condition of mind to have an account stated with him.

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But even if the contract were void or voidable, that ought to have been pleaded under the new rules. [*Parke, B.*—I do not see how the new rules apply to the case; the question arises on the replication, whether the party was non compos mentis, as therein alleged, or not]. It arises also on the general issue, whether there was any accounting or not. [*Parke, B.*—The plaintiff says there was an accounting in fact, but avoids it by pleading the lunacy; but it comes round to the same question, whether there was any accounting in fact with the lunatic]. At all events, the plaintiff is entitled to a verdict on the first issue. [*Alderson, B.*—The entry of the verdict on that issue may be amended by application to the learned Judge].

(a) 2 Stra. 937.

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PARKE, B.—If there had been any proof of an actual accounting with the lunatic, I should have been disposed to grant a rule, in order to afford an opportunity for considering the argument urged by my Brother *Atcherley*. But I think there is no evidence of any accounting with the lunatic; if with anybody, it was with his agent or one of his family; but a lunatic is not competent to appoint an agent: there is no account stated with any person who can be treated as the representative of the lunatic. But if the accounting had been with the lunatic himself, and were proved only by the entries in the pass-book, I have great doubts whether it would entitle the plaintiff to recover: it appears to amount to no more than a promise by the defendant to pay the old debt; then it could not be proceeded upon as a promise, because there was no memorandum in writing signed by the defendant; and if the plaintiff could sue on it as an account stated, the provisions of Lord Tenterden's act would be defeated. But independently of that point, I think the action cannot be maintained, because the account, at all events, was not stated with the lunatic himself, or with any person competent to state an account on his part.

BOLLAND, B.—I am of the same opinion. The case of *Styart v. Rowland* does not govern the present. The evidence there was of an accounting with the wife, which the husband afterwards recognised and sued upon. That is not the present case. I have looked in vain here for any evidence of an actual accounting with the lunatic; there is no proof of any communication whatever to him in his lifetime: all that appears is, that, after his death, the book is found and sued on by his representative.

ALDERSON, B., and GURNEY, B., concurred.

Rule refused.

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VERNON v. SHIPTON.

TROVER for 100 boxes of tin plates.—Pleas, first, not guilty; secondly, that the plaintiff was not, at the time in the declaration mentioned, nor from thence at any time before or at the time of the commencement of the suit was, possessed of the said goods and chattels, or any part thereof, as in the declaration alleged; on which issues were joined. At the trial before *Patteson, J.*, at the last Stafford Assizes, it appeared that the plaintiff, a manufacturer of tin plates at Birmingham, sold to a Mr. Saunders, in June, 1835, 1500 boxes of them, to be consigned to him at Liverpool, for sale there. A portion of them were brought by the defendant, a canal carrier, and were lying at his wharf in Liverpool, to the order of Saunders. They proved to be bad, and Saunders complaining to the plaintiff of their quality, the plaintiff agreed to take back those which remained unsold, which amounted to 76 boxes. Saunders accordingly, on the 10th July, sent the defendant an order to deliver them to the plaintiff. He had previously engaged to supply 500 boxes to one Hargreaves, and having communicated this to the plaintiff, the latter proposed that the 76 boxes should go to Hargreaves in part performance of that engagement. On the 20th July, Saunders accordingly sent an order to the defendant to deliver the 76 boxes to Hargreaves, which was done. The price to be paid for them by Hargreaves to Saunders was 115*l.* 13*s.*, of which he paid him 80*l.*, retaining the balance until the fulfilment of Saunders' contract for the delivery of the rest of the 500 boxes. Of this 80*l.* Saunders paid the plaintiff 50*l.* Some disputes subsequently arising in the settlement of accounts between Saunders and the plaintiff, the latter placed the 50*l.* to the credit of his general account, and called on the defendant to deliver the boxes to

In trover, since the new rules, the plaintiff is entitled to a verdict on the plea of not guilty, if on the trial a conversion in fact be proved, although it appear from the evidence, that, at the time of such conversion, the plaintiff had parted with his property in the goods.

Where a party, to whose order goods were lying at a wharf, gave the wharfinger an order to deliver them to A., but afterwards, with A.'s concurrence, gave him a fresh order to deliver them to B., which he did:—*Held*, in an action of trover by A., against the wharfinger, that the defendant might avail himself of such transfer to B., under a plea that the plaintiff was not possessed of the goods as in the declaration mentioned.

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him pursuant to the first delivery order; and brought this action for their non-delivery.

On this evidence, it was objected for the defendant, first, that no conversion of the plaintiff's goods was proved; and secondly, that the plaintiff was not possessed of the goods at the time of the alleged conversion; and that the defendant was therefore entitled to a verdict on both issues. On the other hand, it was contended for the plaintiff, that the evidence of the subsequent transfer to Hargreaves was not admissible on either of the issues. The learned Judge was of opinion that it was admissible under the second issue; and, under his direction, a verdict was found for the plaintiff on the first issue, and for the defendant on the second; leave being reserved to the defendant to move to enter a verdict on the general issue, and for the plaintiff to move to enter a verdict on the second plea for the sum of 65*l.* 13*s.*

Erle now moved accordingly for the plaintiff.—The transfer to Hargreaves, by the plaintiff's authority, amounted nearly to the same thing as a licence, and ought, under the new rules, to have been specially pleaded, in order to entitle the defendant to give evidence of it. [*Parke, B.*—If Saunders sold to Hargreaves with the plaintiff's concurrence, the plaintiff was not possessed at the time of the conversion; he had at that time parted with the property in the goods, by agreeing that Saunders should transfer them as his own to another person]. The spirit of the new rules requires that each party should have notice in express terms what defence the other party relies on. This evidence did not establish an absolute parting with the property by the plaintiff, but only an authority from him to Saunders to transfer them to Hargreaves, which ought to have been made the subject of a special plea.

Lord ABINGER, C. B.—The plaintiff's possession, in

the hands of the wharfinger, was merely constructive; when the goods were transferred by the delivery order, with his concurrence, to a third party, that constructive possession was at an end.

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PARKE, B.—It amounts to this; Saunders says, now I have found a customer I will take the goods; the plaintiff accedes to that; then they became Saunders's property.

ALDERSON, B.—If the party had been directed to take the boxes away for the plaintiff's use, that would have been a licence, which must have been pleaded as such; in that case there would be no change of the possessory right; here there is an actual agreement that they shall be transferred to a third party.

Rule refused.

R. V. Richards also moved, pursuant to the leave reserved, to enter a verdict for the defendant on the first issue. The goods having ceased to be the plaintiff's at the time of the delivery of them to Hargreaves, it cannot be said that the defendant by that delivery converted *the plaintiff's* property. He is entitled, therefore, even on the plea of not guilty, to a verdict. [*Parke, B.*—That plea admits the property of the plaintiff, and denies the conversion only. It has been held that a sale by a partner is *prima facie* a conversion as against the other partners, and that his interest in the goods as partner must be pleaded]. But it is necessary for the plaintiff to launch his case by proving some property in himself. [*Parke, B.*—Not on this plea]. For what then is he to recover? It is necessary to know what goods he claims in order to enable the jury to assess the damages. [*Parke, B.*—The defendant may obtain a particular, if he has any difficulty in knowing what goods are claimed].

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The defendant is entitled to consider the case without reference to the practice of the Court, and as if it were before a Court of error on a bill of exceptions, upon the evidence given at the trial. The evidence of the demand and refusal of tin plates was not evidence of a demand and refusal of tin plates of *the plaintiff*, and therefore no proof of a conversion. [Alderson, B.—Your objection would apply to every case of a general count]. Unless the property be so far identified as it would be in detainee, it is impossible to say what property is to be recovered; and, if so, how can it be said to be the plaintiff's property? [Alderson, B.—Suppose the plea of not guilty to be expanded into what, under the new rules, it really means,—“I admit the goods belonged to the plaintiff, but deny that I converted them to my own use,”—has not the plaintiff disproved that plea?] The difficulty still remains, how the jury are to assess the damages. [Parke, B.—It would be taken for granted the defendant did not dispute the property in the goods at the time of the conversion; then a conversion being proved, the verdict would be for the value of the goods at that time]. The demand and refusal were not under the circumstances any evidence of a conversion. The *prima facie* inference arising from them is removed by the fact, that the previous delivery to Hargreaves was by the express direction of the plaintiff himself, and was in effect a delivery to his agent.

PARKE, B.—I have no doubt that this was a *prima facie* conversion, within the meaning of the new rules, which required to be confessed and avoided. It was a delivery of the plaintiff's goods to a third person to be his own for the future. If the defendant sets up that this was a delivery by the authority or with the concurrence of the plaintiff, that must be specially pleaded.

ALDERSON, B.—This was the case of an *actual conversion*. Now, the case of *Stancliffe v. Hardwick* (a) established, so far as the authority of this Court could establish it, the proposition, that, if there be a conversion in fact, any defence which goes to shew that it was not a *wrongful* conversion must be specially pleaded. The case of a conversion by demand and refusal only is still open to argument, as to the effect of the plea of not guilty. Here there was an actual conversion; if that was by the plaintiff's authority, it ought to be so pleaded.

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GURNEY, B., concurred.

Rule refused.

(a) 2 C. M. & R. 1.

ELLIOTT and Others v. MARTIN.

DEBT on bond.—The bond was set out on oyer, and recited that the defendant, by a contract or agreement in writing, bearing even date therewith, had contracted with the plaintiffs, on behalf of themselves and the other Guar-

In an agreement whereby the defendant contracted with the guardians of a union to supply bread for the use of the poor,

he covenanted to supply at a certain price loaves of a certain weight, and the guardians agreed to pay for every quantity of the loaves supplied according to the contract, of which a bill of particulars should be sent with the articles at the time of this delivery, or within a month afterwards: provided, that if the articles should not be of the quality contracted for, or should be deficient in weight, or should be delivered without a bill of particulars, the guardians should be at liberty to return them, and purchase others, charging the defendant with the expense and difference of price. In debt on bond given for the due performance of this contract, the breaches assigned were, first, that the defendant delivered loaves deficient in weight, as and for loaves of a particular weight; the issue on which was, that the defendant delivered them as being of the weight stated:—secondly, that he did not deliver a bill of particulars with such loaves, whereupon the board of guardians returned them, and purchased a fresh supply in their place, and thereby incurred expenses, which the defendant did not make good. To this breach the defendant pleaded, that the delivery of a bill with the loaves had been dispensed with by the agent of the board duly authorized, on which allegation issue was taken. It appeared that the defendant brought a quantity of loaves to the door of the workhouse in a cart, and the relieving officer desired to weigh such of them as the defendant would bring out for that purpose. Some of the loaves were accordingly taken into the premises and weighed, and being found deficient in weight, the guardians refused to receive any of the loaves, and they were replaced in the cart, and all taken back by the defendant:—*Held*, that this was a sufficient delivery to satisfy the terms of the first issue.

Held, secondly, that the latter breach was well assigned, and the issue thereon (being found for the plaintiffs) material; the guardians having by the contract the option of returning the bread, unless a bill of particulars were sent *with* it, or of dispensing with that, and suing the defendant unless he sent a bill *within a month*.

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dians of the Towcester Union, in the county of Northampton, to serve, supply, and deliver at each parish and place in the Towcester district of the said Union, from the date of such contract to the 25th day of March next ensuing, (determinable nevertheless as in the said contract mentioned), such quantity of good seconds bread and good seconds flour as should be required for the use of the poor therein, of such quality, at such times, and after the rate and price, and subject to such terms, &c., as in the said contract were particularly mentioned. The condition was then stated to be, that the defendant should perform, fulfil, and keep all and every the covenants, clauses, terms, and stipulations in the said contract contained, on his part to be performed, &c. The plea then set out the contract in hæc verba. After reciting the order of the Poor Law Commissioners for the formation of the Union, the election of the Board of Guardians, their advertisement for the supply of bread and flour, and that the defendant had sent in a tender for supplying the poor of the Towcester district of the Union, which was approved and accepted, the contract contained the following stipulations on the part of the defendant:—That he should thenceforth, until the 25th day of March next, serve, supply, and deliver, or cause to be delivered, at each and every parish and place within the said Towcester district, at such times and in such manner as the said Board of Guardians, or any person or persons duly authorized by them, should from time to time direct, such quantities of good seconds bread and good seconds flour as should be required by the Board for the use of the poor therein, at and after the rates or prices following, viz. 4½d. per full quartern loaf, standard weight, of good seconds, and 1s. 5d. per stone of 14lbs. of good seconds wheaten flour. And the plaintiffs, on behalf of themselves and the other guardians, did thereby agree, that in case the defendant should well and truly serve, supply, and deliver the articles aforesaid, upon the terms

and in manner aforesaid, according to his said agreement, they, or the Board of Guardians for the time being, would pay or cause to be paid to the defendant, at and after the rates and prices aforesaid, during the said term, for every quantity of the said articles so to be ordered, served, &c., *and of which a bill of particulars should be sent with such articles at the time of the delivery thereof, or within one calendar month from such delivery* : Provided always, and it was thereby expressly agreed, that, in case such articles should not be duly served, &c., by the defendant, when and as required by the Board, or by such person as should be duly authorized by them, and when delivered should not in every respect be of the quality and sort contracted for, *or should be deficient in the weight stated and charged for in such bill of particulars* with such articles, or if the *same should be delivered without such bill of particulars*, they the said Board, or the person or persons so authorized by them, should be at liberty to return the same at the expense of the defendant, or give notice for the same to be sent for and fetched away by him; and that, in every such case, it should be lawful for the Board, &c. to purchase a fresh supply, or employ any other person or persons to serve and supply the said district with bread and flour during the period of the contract, in the place of the defendant; and that in such case the defendant should bear and make good all costs, charges, and expenses of such additional supply, over and above the prices at which the same were contracted to be supplied and delivered by him, &c. &c. And that, notwithstanding such agreement for making good the articles not supplied and delivered according to the contract, it should be lawful for the Board to put in suit the bond of even date therewith against the defendant and his sureties, &c. The defendant then pleaded performance generally.

The replication assigned the following breaches: First, that, after the making of the contract, and while the same

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was in full force and effect, to wit, on the 14th October, 1835, the defendant was required and directed by one S. Daniel, then being duly authorized in that behalf by the said Board of Guardians, to supply and deliver 264 loaves of good seconds bread of a certain weight, to wit, each of the weight of 4lbs., at Towcester, on the 15th October; but that he did not nor would supply or deliver bread of the weight aforesaid, pursuant to such direction, but delivered loaves deficient in the said weight, to wit, to the amount of 4 oz. in each loaf. Secondly, that, on the 22nd October, 1835, the defendant supplied and delivered at Towcester divers, to wit, 500 other loaves of bread, which he had been required by and on behalf of the Board to supply and deliver, as and for good seconds bread, and as being of a certain weight, to wit, each of the weight of 4lbs., but did not deliver with them a bill of particulars, whereupon the Board returned them, and purchased a fresh supply in their place, and by reason thereof incurred expenses to the amount of 8*l.*, which the defendant, though required, did not bear and make good. The third breach was for a second delivery of loaves under weight on the 20th October, in the same terms as the first.

The defendant rejoined to the first breach, that, when the bread therein mentioned was supplied and delivered, the contract was not in full force and effect; to the second, that, before the delivery of the bread therein mentioned, one J. B. M., who was duly authorized by the defendant in that behalf, was ready and willing, and then offered to the said S. D. to make out and deliver to him a bill of particulars of the said bread, if he required him to do so; but that the said S. D. being duly authorized by the Board in that behalf, did not require the said J. B. M. to make out and deliver a bill of particulars, and informed him that he did not require him to deliver it with the said bread. The rejoinder to the third breach was, that he, the defendant, did not deliver the bread therein mentioned, as being of

the weight of 4lbs. each loaf. The surrejoinder took issue on the rejoinder to the first and third breaches; and, as to the second, denied that S. D. informed the said J. B. M. that it was not necessary to deliver a bill of particulars; on which also issue was joined.

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At the trial, before *Bolland, B.*, at the last Northampton Assizes, it appeared that the defendant's contract, though dated on the 15th October, 1835, was not signed by him until the 20th. On the former day he supplied 136 loaves, which were distributed to the poor, who brought them back, complaining of their quality. They were thereupon weighed, and found to be deficient in weight to an average amount of 4 oz. each loaf. The defendant attended a meeting of the Board the next day, and admitted the deficiency, but said it was owing to a mistake of his foreman, and that, if they ever found the bread short of weight again, he would pay any fine they might levy on him. On the 22nd, the defendant's son brought about 300 loaves in a cart to the workhouse door. Daniel, the relieving officer, offered to weigh any of them that he would bring out of the cart to be weighed. He brought out accordingly a number of 4 lb. loaves, which, on being weighed in the presence of some of the guardians, were all found deficient in weight, the deficiency averaging about 2 oz. each. The defendant's son offered to make up the deficiency from the loaves remaining in his cart, but this the guardians refused, and also refused to receive any of the bread, the whole of which was accordingly carried away again by him. No bill of particulars was delivered with any of the bread; but there was contradictory evidence as to whether Daniel had dispensed with the delivery of it. It was objected for the defendant, that, as to the delivery of the 15th, which was before the contract was executed, the defendant could not be held liable (which was conceded); and that there was no *delivery* of any bread on the 22nd, such as to satisfy the terms of the

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issue joined as to the third breach. The learned Judge ruled that there was a sufficient delivery on the 22nd, and left it to the jury, on the second issue, to say whether the delivery of a bill of particulars was or was not dispensed with; and the jury found a verdict for the plaintiffs on the second and third issues, and for the defendant on the first.

Adams, Serjt., now moved for a rule nisi for a new trial, on the ground of misdirection, and also for judgment non obstante veredicto on the second issue.—There was no delivery on the second occasion, within the terms of this issue. It is clear there was no delivery to any of the poor; and though some of the loaves were taken from the cart, it was merely for the purpose of being weighed, a doubt having been suggested as to their weight while they were yet in the cart. They were never out of the control of the party who was to deliver. [*Gurney*, B.—If they had been weight, they would have been at once delivered out to the poor. They were delivered for 4lb. loaves. *Alderson*, B.—The breach is, that though you did deliver certain loaves as of 4lb. weight, the loaves you delivered were short of that weight. Your denial is, not that you delivered them, but that you delivered them as of 4lb. weight. Is not the bringing them to the door as 4lb. loaves a delivery as of that weight?] It is no delivery at all. The defendant's agent himself selects the loaves to be sent in to be weighed. [*Parke*, B.—I am very much disposed to think, with my brother *Alderson*, that the delivery itself is not in issue, but that a delivery is admitted; and all that is in issue is, whether the defendant delivered them with a representation of them as being of full weight. Certainly there was a sufficient delivery to prove the issue.]

Then, the defendant is entitled to judgment on the second issue, notwithstanding the verdict. The breach

does not allege that he did not deliver a bill of particulars with the bread, or within a month afterwards, but only that he did not deliver it at the time. Then the plea affirms that the delivery of it at the time was dispensed with. But, under the contract, it was sufficient if he delivered it within a month afterwards. The issue, therefore, found for the plaintiff was an immaterial one.

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PARKE, B.—The agreement contains a distinct clause, that unless a bill of particulars is delivered at the time, the guardians may return the bread, and purchase a fresh supply. The mention of a delivery within a month occurs only in the clause where the guardians stipulate to pay. To secure a supply of good articles, they have a right, unless a bill be sent with the articles, to send them back and order others, and charge the defendant with the expense. If they do not insist on that, then he cannot insist on payment unless he sends a bill, either with the articles, or within a month afterwards. They may sue him for not delivering it within a month, if they please, or they may insist on his delivering it with the goods, and return them if he does not. The issue, therefore, was material, and the breach perfectly well assigned. I will not say whether it would not have been immaterial if found for you, because there could be no dispensation with the contract except by an instrument under seal.

The rest of the Court concurring—

Rule refused.

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GOLDSHEDE v. COTTRELL.

To a declaration by the indorsee against the maker of a promissory note for 420*l.*, the defendant pleaded, that, after it became due, he gave the plaintiff, and the plaintiff received from him, two bills of exchange for 210*l.* each, *to take up the note, and in lieu thereof*: that the defendant was a party to the bills, and liable thereon to the plaintiff, and that they were not due, and were outstanding in the plaintiff's hands. The defendant gave in evidence a memorandum, signed by the plaintiff, stating that the defendant had given him two bills for 210*l.* each, to take up the note for 420*l.*; and it appeared that one of the bills was overdue and unpaid at the commencement of the action:—*Held*,

that it was a question for the jury whether the bills were given in lieu of and satisfaction for the note, or only to gain time for payment; if the former, it was a defence to the action, although the defendant did not prove the latter allegation of the plea; if the latter, it was no defence, unless he proved that both the bills were outstanding at the commencement of the action.

ASSUMPSIT on a promissory note for 420*l.*, dated 4th August, 1835, made by the defendant, payable to his own order, at two months' date, and indorsed by him to the plaintiff; with a count on an account stated. Plea to the first count, that, after the making of the promise and undertaking in that count mentioned, and after the note therein mentioned was mature and due and payable, and before the commencement of this suit, to wit, on the 20th April, 1836, the defendant, at the request of the plaintiff, gave to him, the plaintiff, and the plaintiff then received from the defendant, two bills of exchange of the value of 210*l.* each, *to take up* the said note in the first count mentioned, for 420*l.*, then over due, *and in lieu thereof*: and the defendant saith, that he is a party to the said two notes of 210*l.* each, and liable thereon to pay to the plaintiff or his order the said two several sums of 210*l.* on each of the said two bills then delivered by the defendant to the plaintiff to take up the said note of 420*l.*, according to the tenor and effect of the said two bills of exchange, &c.; and that the said two bills for 210*l.* each are not yet due, and are outstanding in the plaintiff's hands. Verification. Plea to the second count, non assumpsit.

Replication to the first plea, that the defendant did not give to him the plaintiff the bills of exchange, or either of them, in the plea mentioned, for the purpose therein mentioned, and upon the terms therein alleged, in manner and form, &c.; and that one of the same was due and unpaid at the time of the commencement of this suit: on which issue was joined.

At the trial before Lord Abinger, C. B., at the last Surrey Assizes, the plaintiff having proved the making and indorsement of the promissory note stated in the declaration, the defendant gave in evidence the following memorandum, signed by the plaintiff:—

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“ Charles Herbert Cottrell, Esq. [the defendant] has given me two bills for 210*l.* each, to take up a bill for 420*l.*, overdue.

“ B. GOLDSHEDE.”

The defendant had not, however, obtained possession of the 420*l.* note.

On the part of the plaintiff, it was proved also that one of these bills was overdue and unpaid when the action was commenced, the other being at that time yet running. It was contended for the defendant, that the plaintiff's right to sue upon the note for 420*l.* was extinguished by the giving of the bills, or at least suspended until both of them had arrived at maturity, and were dishonoured; and that, at all events, he was entitled to recover only to the amount of the 210*l.* bill proved to be overdue and unpaid. The learned Chief Baron, however, was of opinion, that, on these pleadings and facts, the plaintiff was entitled to recover the whole amount of the original note and interest, and a verdict was taken for the plaintiff for 443*l.* 14*s.* 6*d.*, leave being reserved to the defendant to move to enter a nonsuit, or to reduce the verdict by the sum of 210*l.*

Thesiger now moved accordingly.—The memorandum given in evidence by the defendant proved the allegation in the plea, that the bills were given to take up the note, and in lieu of it. Then the fact, that one of the notes was overdue and unpaid was not sufficient to remit the plaintiff to his original contract, and entitle him to sue on the 420*l.* note, retaining the 210*l.* bill which was still running. He ought either to have sued on the 210*l.* bill

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which was due, or to have abandoned the second contract altogether, returned the bill which was still running, and then he might have been entitled to sue on the original contract. [*Parke, B.*—What is the meaning of *taking up* a bill? Is it not the party's coming with money or some other security in his hands, and taking away the bill instead of it?] The substance of the issue is, that the bills were given in lieu of and substitution for the note. [*Parke, B.*—The whole turns on the meaning of the expression "to take up;" if they were given *in lieu* of the note, the original contract would revive when they were dishonoured. Lord *Abinger, C. B.*—It would seem from your statement, that I ought to have left it to the jury to say with what intention the bills were given.] The plaintiff insisted, that, as soon as it appeared that *one* of the bills was overdue and unpaid, he was remitted to his original contract: it is submitted that that is not the proper conclusion. [*Alderson, B.*—If you can satisfy the Court that the memorandum means that the bills were given *in satisfaction* of the note, then it is a sufficient defence, though you did not prove the latter part of your plea. *Parke, B.*—On the other hand, if they were given only to gain time, there is no answer to the action, because you ought to shew that both were outstanding when the action was brought.]

LORD ABINGER, C. B.—I think substantially the verdict was right. If the question had gone to the jury, I think there is little doubt which way they would have found it: there was no evidence to shew that the memorandum meant that the two bills were given absolutely in substitution for the note.

PARKE, B.—The fact of the defendant's not taking back the note, raised a very strong inference against him. If the bills were given in substitution for it, that was a question for the jury; but the defendant's counsel did not ask

that it should be left to the jury, and I think there can be no doubt, if it had been, that they would have found against him. If the memorandum is to be construed the other way, it reduces the defendant to the latter branch of his plea; then he must shew that both the bills were outstanding. That is not proved.

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ALDERSON, B., and GURNEY, B., concurred.

Rule refused.

ATTORNEY-GENERAL *v.* PARSONS.

THIS was an information of intrusion, to recover possession of certain encroachments on the wastes of the Crown within the manor of Iscoed, in the county of Radnor (*a*).

The *Attorney-General*, in Trinity term, prayed that the inquisition might be taken in the county of Hereford, instead of the county of Radnor, where the venue was laid, on an affidavit stating that there were not in the latter county forty-eight persons qualified to serve as special jurors, and that a fair trial could not be had there. He cited *Rex v. Webb* (*b*) as an authority to shew that the King may choose his county, and may waive that which he seemed to have elected before. [*Parke*, B.—That was a transitory cause of action: have you found any such authority in the case of an injury to realty?] The *Attorney-General* may lay the venue where he pleases, and it may be stated in this form—"In the county of Radnor, to wit, in the county of Hereford."

In an information of intrusion, the Crown may of right lay the venue in any county, or have the inquisition taken in a different county from that in which the venue is laid.

The title of the Crown to lands of which it has been out of possession for 20 years, may be tried in the information of intrusion itself, and need not be first found by inquest of office; the only effect of the stat. 21 Jac. 1, c. 14, being, to throw

the onus of proving title in the first instance, in such case, on the Crown. *Semble*, that, in an information at the suit of the *Attorney-general*, a tales may be prayed for the Crown without his warrant, though he be not present; but not for the defendant.

(*a*) See *Doe d. Watt v. Morris*, 2 Bing. N. C. 189.

(*b*) *Ventr.* 17.

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PARKE, B.—No doubt the Crown has such a prerogative in all transitory matters; my doubt is, whether the same power extends to suits relating to real estate. If you cannot find any such precedent, you had better take a rule to shew cause only.

On a subsequent day, the *Attorney-General* cited Manning's Exch. Prac. 197, where it is stated that the King, in an information of intrusion, may lay the venue in any county, without regard to the local situation of the premises (a). The present application, however, was not to change the venue, but to have the inquisition taken in the county of Hereford; and he had not found any instance of an information of intrusion being tried in any other county than that in which the lands lay.

The Court (b) held, that the Crown was entitled, as of right, to lay the venue in any county, or to change it when laid in a particular county, or to have the inquisition taken in any other county. The prayer was therefore granted.

The information was tried before *Patteson, J.*, at the Hereford Summer Assizes, when the title of the Crown to the manor of Iscoed was clearly made out; it having been formerly part of the possessions of Edmund Mortimer, Earl of March, from whom it descended to Edward, Duke of York, father of King Edward IV., and through him to the Crown. It was objected, however, for the defendant, that by the express terms of the stat. 21 Jac. 1, c. 14, s. 4 (c), the title of the Crown could not be determined in the in-

(a) *Lyster v. Edwards*, Savile, 12.

(b) Lord Abinger, C. B., *Boland, B.*, and *Alderson, B.*

(c) Which enacts, "that, whenever the King, his heirs or successors, and such from or under whom the King claimeth, and all others claiming under the same title

under which the King claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements, or hereditaments, within the space of twenty years before any information of intrusion brought or to be brought to reco-

formation of intrusion, (the encroachments in question having been made above twenty years), but ought to have been first found by inquest of office, after which the Crown would be entitled to recover possession by the information. The learned Judge overruled the objection, and a verdict was found for the plaintiff.

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Carwood now moved, by leave of the learned Judge, for a rule nisi to enter a verdict for the defendant, or for a new trial, and renewed the same objection. The statute enables the defendant, where the King has been out of possession for twenty years, to retain the possession until the title shall be tried, found, and adjudged for the King. [Lord *Abinger*, C. B.—That is, whereas at common law the defendant was put to shew his title on the record, the statute says he may in such case throw the onus probandi on the Crown.] The title cannot be tried in the information of intrusion itself, but ought to be first found in the regular way by inquest of office. The Crown is placed by the statute in the same situation as it would have been in at common law, having never been in possession. The information of intrusion is in the nature of an action of ejectment, and also of trespass for damages:—here, however, nothing was sought to be recovered but the possession. When therefore the statute says that the title is to be first found, it must mean that it is to be first found as at common law. [*Alderson*, B.—The word “first,” on which your whole argument seems to rest, is not in the statute.]

LORD ABINGER, C. B.—It means only that the onus is

ver the same; in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant

or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, and adjudged for the King.”

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thrown on the Crown to prove its title in the first instance. The defendant shall not be bound to plead his title specially where he has had twenty years' possession without disturbance; in that case the Crown stands in the situation of a subject.

ALDERSON, B.—Where the defendant pleads not guilty, or non intrusit, though the Crown proves the intrusion, he is entitled to hold the possession until the Crown also proves title (a).

Curwood then objected, that a tales had been prayed for the Crown on the trial, without the Attorney-General's warrant, he not being present.

LORD ABINGER, C. B.—In the ordinary case, where the Attorney-General's warrant is necessary, it is where the King is a party; here the Attorney-General himself is a party to the record, and appears by his counsel. I am much disposed to think that the Attorney-General alone could make the objection. You could not pray a tales without a warrant.

It being suggested, however, that a warrant was actually annexed to the record, inquiry was made at the King's Remembrancer's office, when that was found to be the case.

Rule refused.

(a) See Manning's Practice, 198.

DAWSON v. MACDONALD.

In an action on a bill of exchange by indorsee against acceptor, the defendant, having obtained an inspection of the bill, pleaded pleas denying the acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 Will. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die. The Court struck out the last plea.

ACTION by the indorsee against the acceptor of a bill of exchange. The defendant obtained an order for an

inspection of the bill, pleaded pleas denying the acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 Will. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die. The Court struck out the last plea.

inspection of the bill, on an affidavit that he believed the acceptance to be a forgery of his handwriting. The bill having been accordingly inspected by the defendant's attorney, the defendant then obtained an order to plead several matters; and pleaded, first, that he did not accept the bill in the declaration mentioned; secondly and thirdly, pleas denying also the drawing and indorsement; and, fourthly, a special plea raising the defence that the bill was written on paper stamped with an old die, in contravention of the provisions of the statute 3 & 4 Will. 4, c. 97, s. 17.

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Humfrey obtained a rule to strike out the fourth plea, on the ground that the matter thereby pleaded might be given in evidence under any of the other pleas, or at all events under the plea of non-acceptance.

R. V. Richards shewed cause, and urged that this differed from the cases where questions arose on the general stamp act, and that the defendant ought to have the opportunity of putting this specific defence on the record.

PARKE, B.—The only consequence of the wrong stamping is, that the instrument cannot be given in evidence. Allowing such pleas as this only raises doubts at the bar where none really exist. There can be no question that this defence is admissible under the plea of non-acceptance.

Rule absolute.

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BAILEY, Assignee of CALLIS, an Insolvent Debtor, *v.*
CHITTY.

A plaintiff is liable to costs under the Middlesex Court of Requests Act, 23 Geo. 2, c. 33, s. 17, where he recovers less than 40*s.*, though his claim was reduced below that sum by the statute of limitations being pleaded.

But where the declaration was in debt for work and labour, and it appeared that the work and labour consisted of the levying of an execution by the plaintiff, as a broker, on the goods of a party resident in Surrey:—Held, that this was not cognizable by the Court of Requests, though the defendant resided in Middlesex.

THIS was an action of debt for goods sold and delivered, and work and labour done, by the insolvent; and on an account stated between the insolvent and the defendant. The defendant pleaded, first, *nunquam indebitatus*; secondly, the statute of limitations; and thirdly, a set-off. At the trial, at the Middlesex sittings after last term, the plaintiff proved the sale and delivery of a chest of drawers for 3*l.* by the insolvent to the defendant; and also work done by the insolvent as a broker, in levying a distress on the goods of a tenant of the defendant, at his residence at Richmond, in Surrey. The defendant produced a bill of parcels furnished by the plaintiff, from which it appeared that the sale and delivery of the chest of drawers took place in the year 1829; and the plaintiff had a verdict only for 1*l.* 19*s.* 9*d.* debt (the amount of the claim for the levy), and 1*s.* damages. The defendant was resident in Middlesex.

Platt had obtained a rule to shew cause why a suggestion should not be entered on the roll, in order to deprive the plaintiff of his costs, under the Middlesex Court of Requests Act, 23 Geo. 2, c. 33.

Miller shewed cause.—There are three answers to this application. First, the debt due was, in truth, above 40*s.*, although, in consequence of the plea of the statute of limitations being pleaded, it has been cut down on the trial to a smaller sum. It is not a case, therefore, in which the plaintiff could have brought his action in the inferior Court. It falls within the principle of the cases in which the act has been held not to apply to the case of a claim reduced by a plea of set-off. *Jenkinson v. Mor-*

ton (a). The *whole* debt was in existence at the time when the plaintiff brought his action. [*Parke, B.*—No, it was not then in existence, if the statute was then in operation. In the case of set-off, the debt is due and payable, and the plaintiff might recover it, down to the last moment before the commencement of the action]. In *Horn v. Hughes* (b), Lord *Ellenborough* said, "It is unnecessary to say what we might have thought, if it had appeared that the plaintiff had a reasonable ground for bringing his action, but that from the absence of a witness, or other cause without his default, he had failed in proving his whole demand." And in *Harsant v. Larkin* (c), *Dallas, C. J.*, says, "With a view to the decision on a motion like the present, it must be always a question whether or not the plaintiff had reasonable and probable cause to litigate such a demand." And *Burrough, J.*, adds, "In all these cases much must be left to the discretion of the Court upon the facts as they appear in evidence. The intention of the legislature was, that the suggestion as to costs should be applied to cases where there was a clear demand for less than 40*s.*" Now here the plaintiff certainly had reasonable cause for bringing the action; he sues as an assignee, whose duty it is to collect all the debts due to the estate, and the insolvent had sworn to a debt of above 40*s.* It was not until after action brought that he could know that the statute of limitations would be set up as a defence. [*Parke, B.*—You might apply the same reasoning to almost every other defence, because now almost every defence must be pleaded. The cases you refer to were not decided on the same words: the words of this act are peremptory]. They are quite as imperative if applied to the case of set-off. [*Alderson, B.*—Suppose the pleas of non-assumpsit and set-off pleaded together;

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(a) 1 M. & W. 300.

(b) 8 East, 347.

(c) 3 Brod. & Bing. 257.

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the jury, on the first issue, would find damages to the whole amount. The very circumstance of pleading a set-off admits a debt to a further amount]. The statute of limitations does not extinguish the *debt*, but only the *remedy*. *Jenkinson v. Morton* shews that the first section of the act is to be read in conjunction with the seventeenth: but from the first section it appears that the act is to apply only where the *demand* is above 40*s*. [*Alderson, B.*—That means, not what the plaintiff may choose to demand, but what he has a right to; but he has no right to demand what is barred by the statute of limitations, because he cannot recover it].

Secondly, the whole cause of action in respect of which the plaintiff recovered arose in the county of Surrey, and therefore was not cognizable by the Middlesex Court of Requests, whose jurisdiction is expressly limited, by s. 4, to the same causes of action of which the old county Court had cognizance, which were only those arising within the county. *Tidd. Pr.* 516 (9th ed.); *Welch v. Froyte* (a); *Tubb v. Woodward* (b); *Smith v. O'Kelly* (c); *Harwood v. Lester* (d).

Thirdly, the plaintiff did, in fact, recover more than 40*s*. The amount received is made up of the debt and damages, which together are above that sum. It is like the case of a recovery of principal and interest. [*Alderson, B.*—If you construe the act literally, you are out of Court, for your *damages* are only a shilling; if you are to take its spirit, you are out of Court also, because what you have actually obtained is only 1*l.* 19*s.* 9*d.* You cannot have both the letter and the spirit. *Parke, B.*—If the jury find an amount for which you ought to have sued in the county Court, you must pay costs].

Platt, contra, was desired by the Court to confine him-

(a) 2 H. Bl. 29.
(b) 6 T. R. 175.

(c) 1 Bos. & P. 75.
(d) 3 Bos. & P. 617.

self to the second point. The ground of the action is the *contract*, and the breach of it; it matters not where the work was actually done. The foundation of the action is, that in consideration of the work and labour having been done, the defendant promised to pay for it; and the declaration alleges that he was liable to be summoned to the county Court. [Parke, B.—That is, as far as his personal residence is concerned; but he must be liable to be summoned *for this debt*].

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PARKE, B.—This is an *indebitatus* count for work done; then the doing of that work was the cause of action, which therefore arose in Surrey. It is clear the action cannot be brought in the county Court, unless both the defendant resides, and the cause of action arises, within the county.

The other Barons concurred.

Rule discharged.

ELSWORTH v. COLE.

ASSUMPSIT for work and labour and commission, for money paid, and on an account stated.—The defendant pleaded a plea, setting forth that the cause of action arose out of time bargains in stock, in similar terms to that pleaded in *Oakley v. Rigby* (a).

Time bargains in foreign funds are not within the prohibition of the Stock-jobbing Act, 7 Geo. 2, c. 28, nor illegal at common law.

At the trial before Lord Abinger, C. B., at the London sittings after Trinity term, it appeared that the action was brought to recover the amount of differences on transactions in the foreign funds, paid by the plaintiff, a stock-broker, for the defendant. It was objected for the defendant, that such transactions were illegal, and the plaintiff

(a) 2 Bing. N. C. 732; 2 Scott, 194.

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was therefore not entitled to recover. The objection was overruled, and the plaintiff had a verdict.

Sir *W. Follett* now moved for a new trial.—The Court of Common Pleas undoubtedly decided, in *Wells v. Porter* (a), and *Oakley v. Rigby*, that time bargains in foreign stock are not within the prohibition of the Stock-jobbing Act, 7 Geo. 2, c. 8, nor illegal at common law (b). The question is, whether this Court is disposed to uphold those decisions.

Lord ABINGER, C. B.—We do not consider them unsatisfactory on either point.

Rule refused.

(a) 2 Bing. N. C. 722; 2 Scott, M. 386; *Lorymer v. Smith*, 1 B. & 141. Cr. 3.

(b) See *Bryan v. Lewis*, R. &

HARRIES v. THOMAS.

A client sued his attorney for negligence and bad advice, and also for money

had and received to his use. To the counts for negligence, the defendant pleaded the statute of limitations; to the money counts a set-off for bills of costs. At the trial, the Judge having expressed an opinion that the statute of limitations was a bar to the plaintiff's recovering on the counts for negligence, at his suggestion the pecuniary accounts between the parties were referred to a barrister, and a juror was withdrawn. By the order of reference, the arbitrator was to settle all matters in difference between the parties touching the defendant's bills of costs, and all the plaintiff's demand on the defendant, with power to have the defendant's bills taxed; and to ascertain the balance between the parties, and direct by and to whom, and when, the same should be paid; but no question of liability was to be raised. The arbitrator directed the defendant's bills to be sent for taxation, and in the meantime the plaintiff discovered that the defendant was not admitted in the Courts at Westminster (but only in the Court of Great Session in Wales) where a considerable part of the business was done, and he raised that objection before the arbitrator. The arbitrator, by his award, after stating that he had heard, examined, and considered the proofs, &c., of the parties, and had admitted and considered the evidence tendered to shew the several times when the defendant was admitted in the superior Courts, awarded that the balance due from the defendant to the plaintiff was 170*l.* and a fraction, and directed the defendant to pay that sum to the plaintiff. On motion to set aside the award, on the ground that the arbitrator had exceeded his authority in making any deductions in respect of the defendant's non-admission in the superior Courts, there were conflicting affidavits as to whether the liability in this respect was in the contemplation of the parties at the time of the submission. The Court, however, set aside the award; and on a subsequent motion, stayed the proceedings in the cause, on the ground that the withdrawal of a juror, under the circumstances, finally determined the action.

and bad advice in the conduct of certain mortgage transactions as the attorney of the plaintiff, and also certain sums of money alleged to have been received by him as the attorney and on account of the plaintiff. The declaration contained five special counts, four of them being for the alleged negligence and bad advice, and the fifth for a breach of promise to return deeds, and the usual money counts. To the special counts, the defendant pleaded the general issue; to the four first counts, the Statute of Limitations; to the fifth count, a lien on the deeds; and to the money counts, a set-off for bills of costs. The cause came on for trial before *Parke, B.*, at the Carmarthenshire Summer Assizes, 1834, when the plaintiff gave evidence, under the special counts, of three defective mortgages granted to him, under the defendant's advice, in the years 1821, 1824, and 1826, (all being more than six years before the commencement of the action), and also that the defendant had advised the plaintiff to execute the mortgage bond mentioned in the case of *Edwards v. Brown*,^(a) and offered evidence also of losses sustained by the plaintiff within six years before the commencement of the action, in consequence of the professional negligence ascribed to the defendant. The learned Judge, however, held that the Statute of Limitations began to run at the respective dates of the original transactions, and therefore that the plaintiff was precluded from recovering on the special counts; and at the suggestion of the Court, the other matters of account between the parties were referred to an arbitrator, and a juror was thereupon withdrawn. The order of reference stated, that the arbitrator was to settle all matters in difference between the parties touching the defendant's bills of costs, and all the plaintiff's demand on the defendant, with power to have the defendant's bills taxed; and to ascertain the balance between the

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(a) 3 Y. & J. 423; 1 Cr. & J. 307.

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parties, and to direct by and to whom and when the same should be paid; *but no question of liability was to be raised.* The arbitrator, on the first meeting of the parties before him, directed the defendant's bills to be taxed by the Master. Before the taxation, it was discovered that the defendant, who had originally been admitted an attorney and solicitor of the Court of Great Sessions in Wales only, was not admitted in any of the Courts at Westminster until after a considerable part of the business charged for in those bills was done. It was thereupon contended before the Master, on taxation, that the charges previous to the defendant's admission ought to be struck out; but the Master, considering this to be the province of the arbitrator, and that he had to decide only on the reasonableness of the charges, did not make any deductions, although he stated in the margin of the bill his opinion that those charges ought not to be admitted. The arbitrator, by his award, after stating that he had had the defendant's bills taxed, and had heard, examined, and duly considered the allegations, vouchers, proofs, and witnesses of the parties respectively, and had admitted and duly considered the evidence tendered on the part of the plaintiff for the purpose of shewing the several days and times on which the defendant was admitted a solicitor in the Court of Chancery, and an attorney in the Court of Exchequer, and had ascertained the balance between the parties; awarded that the balance due from the defendant to the plaintiff was 170*l.* 12*s.* 6½*d.*, and directed the defendant to pay that sum to the plaintiff within six weeks. He directed also that the defendant should on demand deliver up to the plaintiff the papers, deeds, &c., belonging to the plaintiff in his possession.

In last Easter Term, *John Evans* obtained a rule nisi for setting aside the award, on affidavits shewing that the state of the account proved before the arbitrator was such

that he could not have found the balance awarded to be due from the plaintiff, unless he had deducted the charges in the defendant's bills of costs previous to his admission in the inferior Courts; and that in so doing he had exceeded his authority, inasmuch as by the submission it was expressly provided that no question of liability should be raised, which stipulation was intended by the parties to apply to this particular liability of the defendant. In the same term,

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E. V. Williams shewed cause, on affidavits stating that the term, "no question of liability to be raised," was introduced into the submission only for the purpose of precluding any question before the arbitrator as to the defendant's liability on the special counts for negligence. He contended, however, that the award was conclusive; *Symes v. Goodfellow* (a); that nothing appeared on the face of the award to shew that the arbitrator had acted on the evidence as to the time of the defendant's admission in the Courts at Westminster; and that the Court could not look at any other document than the award itself, to shew on what grounds he acted. *Williams v. Jones* (b).

Evans, in support of the rule, referred to the accounts handed in to the arbitrator, to shew that the balance awarded to the plaintiff must necessarily have been found by excluding the charges in question, and insisted that the arbitrator had no authority to exclude them; and

THE COURT directed that the rule should be absolute, unless the plaintiff agreed to go before the arbitrator again, for him to ascertain the balance on the whole of the accounts.

(a) 2 Bing. N. C. 532 ; 1 Scott, 769. (b) 5 Man. & R. 3.

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The plaintiff not agreeing to this, *John Evans*, in the early part of this term, obtained a rule nisi to stay all further proceedings in the action, on the ground that it was determined, under the circumstances, by the withdrawal of a juror, and referred to *Moscati v. Lawson* (a).

Maule and *E. V. Williams* now shewed cause.—It was no part of the agreement between the parties that the withdrawal of a juror should put an end to the suit at all events, but only in case the arbitrator should come to an effectual award. But the award having been set aside, and the reference having, therefore, altogether become abortive, the consideration for the plaintiff's agreement has failed, and he is entitled to proceed with the action. *Moscati v. Lawson* does not apply; there it was clearly the intention of the parties to put a final end to the litigation between them. If the plaintiff is to derive no benefit from the award, there is no reason why his proceedings should be stayed. There can be no ground for saying, as matter of law, that the withdrawal of a juror is necessarily a bar of further proceedings in the action. *Sanderson v. Nestor* (b), *Everett v. Youells* (c). This action, then, can be supported only on the ground that the plaintiff has been guilty of a breach of good faith, by raising the objection before the arbitrator that the defendant could not recover for the charges in question; and to warrant the extraordinary interposition of the power of the Court in staying the proceedings, that breach of faith must be clearly and unequivocally made out. [They then argued, on the conflicting statements in the affidavits, that there was no intention at the time of the submission to exclude that objection.] The award, being set aside, has become an entire blank, and no data can be assumed from it to lead to a conclusion one way or the other.

(a) 1 Harr. & Wool. 572. (b) Ry. & M. 402. (c) 3 B. & Ad. 349.

Evans, contra.—This was not a reference by order of Nisi Prius in the ordinary way, of the cause and all matters in difference, but a juror was first withdrawn, which could only be for the purpose of determining the cause as a cause, and then the parties agreed to go before an arbitrator, who should look into the pecuniary accounts in dispute between them, and strike a fair balance; it was a mere question of quantum that was submitted to his decision. *Moscato v. Lawson* is directly applicable. [Lord Abinger, C. B.—That case would amount to an authority that the plaintiff ought to be precluded from bringing a fresh action. The difficulty is, that it appears here that something remained to be settled which was not settled by the withdrawal of the juror, viz. the settlement of the pecuniary balance. Parke, B.—You must apply that case sub modo, and say that it was the intention of the parties here to put an end to this action, leaving the plaintiff a distinct pecuniary claim for money had and received, so that if there were not an effectual award, he might bring a fresh action for that. It certainly was not intended to put an end to his claim for money had and received.] No doubt it was intended that the pecuniary accounts should be settled between the parties, but not upon this record or in this action. The Court, by making the rule absolute for setting aside the award, decided in effect that the plaintiff was guilty of a breach of his agreement by raising this objection, of which at the time of the trial he knew nothing, and which therefore could not have been then within his contemplation. Whether the pecuniary demand on either side was or was not recoverable under this declaration or plea of set-off, evidence would have been given of it before the arbitrator: that shews that it was not a reference of the cause.

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Lord ABINGER, C. B.—I entirely agree with Mr. Williams, that the mere withdrawal of a juror does not of

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necessity put an end to the cause. A juror may be withdrawn merely for the accommodation of both parties, it being found convenient not to try the cause, although, the jury having been sworn, the record cannot be withdrawn. It depends entirely on the circumstances under which the agreement is come to; if it appears that it was the intention of the parties to put an end to the cause, for obtaining a particular advantage, or avoiding a particular loss, the Court will give effect to it, or, under some circumstances, even preclude the plaintiff from bringing another action. The same principle applies to the case of a *stet processus*; sometimes it concludes the parties, sometimes not, according to the circumstances. In this case I thought, at first, that this was a reference of the action; and if so, on the juror being withdrawn, and the arbitrator failing to make an award which can be sustained, it would be hard to conclude the plaintiff in that action; but when it appears that the juror was withdrawn under such circumstances as shew that the particular cause was abandoned, and that it was not the cause which was referred, we should preclude the party from proceeding. Now, here the order of reference states that the arbitrator is to settle all matters in difference between the parties, touching—what?—not the cause, but the defendant's bills of costs, and all the plaintiff's demand on the defendant; that is, the pecuniary demands on either side are to be referred, and the balance ascertained; but the arbitrator has no power in the cause at all; that is put an end to; he is only to enter into the pecuniary matters in dispute between the parties, and, no matter who is plaintiff or defendant, to direct to whom the balance is to be paid. I was not present at the decision of the rule in this Court, but I should say that the decision could not have been otherwise—the terms “no question of liability to be raised,” could not be otherwise interpreted than as an agreement that no question should be raised of liability as to the

pecuniary claims of either party, but a question merely of quantum submitted to the arbitrator. It is no matter whether, if the parties had known more, they would have come to this agreement; they do so agree, that there shall be no question raised of liability as to the bills of costs to be taxed; they go to arbitration as if it were a bill on a simple account. A breach of good faith is committed whenever a party departs from the contract he actually enters into: he is bound to abide by it, whatever the consequences turn out to be. Then the defendant seeks to set aside the award, because the plaintiff so abandoned his agreement; and it is accordingly set aside on certain terms. If the parties are not disposed to accept those terms, the question comes, whether the circumstances are such as to entitle the parties to go on again with the original cause; and we think they are not, and that this was a mere reference of a matter of account, independent of the cause, on which, if the arbitrator thought fit, he might direct a payment by the plaintiff to the defendant. We are not deciding whether the plaintiff may or may not bring a new action; if he does so, and an application is made to stay his proceedings, it will then be time enough to determine whether the principle of the decision in *Moscatti v. Lawson* applies to this case. But we think, on the whole circumstances before us, the agreement of the parties was to put an end to the cause, each receiving a benefit by going before the arbitrator for settlement of their pecuniary account. The defendant is therefore entitled to have the rule made absolute, but the parties may still, if they please, go before the arbitrator again on the terms suggested on the former occasion.

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PARKE, B., BOLLAND, B., and GURNEY, B., concurred.

Rule absolute accordingly.

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PROBERT v. PHILLIPS and Others.

Assumpsit for work and labour, &c. Pleas, first, except as to 15*l.* 15*s.* 7*d.*, non assumpsit; second, as to 52*l.* 12*s.*, parcel, &c., payment; third, as to 52*l.* 12*s.*, other parcel, &c., that the work was done on a special contract subjecting the plaintiff to a deduction for certain damage, and that such damage amounted to that sum; fourthly, as to 20*l.*, other parcel, &c., a set-off; and fifth, payment into Court of 15*l.* 15*s.* 7*d.* Issues being joined on the four first pleas, the verdict was found for the plaintiff on the general issue for 73*l.* 18*s.* 10*d.*; on the second issue, for the defendant; on the third, for the defendant as to 20*l.*; and on the fourth, for the defendant as to 5*l.* 6*s.* —Held, that the defendant was entitled to the general costs of the cause.

ASSUMPSIT for work and labour, goods sold and delivered, money had and received, and on an account stated. Pleas—first, except as to 15*l.* 15*s.* 7*d.* non assumpsit; secondly, as to 52*l.* 12*s.*, parcel, &c., payment; thirdly, as to 52*l.* 12*s.*, other parcel, &c., that the work was done under a special contract to keep the defendant's harness in good repair, and that the plaintiff should suffer a deduction for any damage sustained by the defendant in consequence of its not being kept in good repair; and that by reason of its not being so kept, the defendants sustained damage to the amount of 52*l.* 12*s.*; fourthly, as to 20*l.*, other parcel, &c., a set-off for use and occupation; fifthly, payment into Court of 15*l.* 15*s.* 7*d.* The replications denied the payment alleged in the second plea, the agreement and the damage stated in the third, and the set-off, and accepted the 15*l.* 15*s.* 7*d.* in satisfaction of that amount. At the trial, the cause was referred to a barrister, to certify how and for what amount the verdict should be entered on the several issues: and he certified that the verdict should be entered on the general issue for the plaintiff, for 73*l.* 18*s.* 10*d.*; for the defendants on the second issue; on the third issue, for the defendants as to 20*l.* of the sum of 52*l.* 12*s.* therein mentioned, and as to the residue for the plaintiff; on the fourth issue, for the defendants as to the sum of 5*l.* 6*s.*, parcel of the 20*l.* therein mentioned, and as to the residue, for the plaintiff. The several sums found to be covered by the three latter pleas, therefore, amounted in the whole to 77*l.* 18*s.*; and the verdict was entered for the defendants accordingly, and the postea delivered to the defendants' attorney.

Greaves now moved for a rule to shew cause why the postea should not be delivered up to the plaintiff's at-

torney; and contended that the plaintiff was entitled to the general costs of the cause. The defendants forced the plaintiff down to trial in order to establish his claim, by putting the general issue on the record. [*Parke, B.*—That only entitles him to the costs of the general issue.] In *Broadbent v. Shaw* (a), where, to trespass qu. cl. fr., the defendant pleaded not guilty, and also a justification of a right of way, the replication joined issue on the plea of not guilty, traversed the right of way, and new assigned, and the defendant joined issue on the right of way, and suffered judgment by default as to the trespasses newly assigned, and there was a verdict for the defendant on the justification, and the damages were assessed at 1*s.* on the new assignment, the plaintiff was held entitled to the general costs of the trial, because he was forced to go down to trial by the general issue remaining on the record.

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PARKE, B.—That was because the defendant did not withdraw the general issue so far as related to the trespasses newly assigned; therefore the plea of not guilty applied to something beyond the trespasses newly assigned, and which was not covered by the special plea. That case does not apply here, because the pleas, being pleaded to separate parts of the demand, cover the whole of it. It had been the practice for many years, where there was a new assignment, to withdraw the general issue as to the trespasses newly assigned.

ALDERSON, B.—The form is given in *Williams's Saunders* (b).

Rule refused.

(a) 2 B & Ad. 940.

(b) Vol. i. p. 300, note (f').

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SHAVE v. SPODE.

Bail (at least town bail) may justify in person, where there has been an insufficient affidavit of justification.

ON motion to justify bail in this cause, *Butt* objected that the affidavit of justification was insufficient, inasmuch as it did not state where the property was situate, nor separate the value.

Humfrey, in support of the bail, stated that they appeared to justify in person.

Butt referred to *Penson's bail (a)*, where *Patteson, J.*, says, that where the bail profess to justify in the form directed by the new rules, and fail to comply with them, they cannot resort to any other form. That, however, was a case of country bail.

Per Curiam.—If the bail appear, they may justify; but the consequence is, that the plaintiff opposes them without the risk of costs.

The bail justified.

(a) 4 Dowl. P. C. 627.

BOLTON v. JOHNSON.

Notice of justification of bail having been given, the plaintiff delivered a declaration de bene esse, to which the defendant demurred. The plaintiff, after an ineffectual attempt to have the demurrer set aside as frivolous, obtained an order to join in demurrer:—Held, that, after this, the bail could not be opposed, nor could they justify.

ON bail appearing to justify in this case, *Steer* was about to oppose them, when

Butt, for the bail, objected that the plaintiff had no right to oppose them, having obtained a judge's order to join in demurrer. Notice of justification having been given, the plaintiff delivered a declaration de bene esse, to which the defendant demurred. An application was

the demurrer set aside as frivolous, obtained an order to join in demurrer:—Held, that, after this, the bail could not be opposed, nor could they justify.

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agreed between the plaintiff and defendant, that the defendant should take the said house of the plaintiff at the expiration of twelve months from the day and year aforesaid, on having a month's previous notice so to do, and to pay the plaintiff the sum of 500*l.* for the goodwill of the business, and also to take all the household furniture, fixtures, and stock in trade, at a fair valuation, in the usual way, and to pay the plaintiff the amount thereof, and also for the time to come in the licences, on their being transferred to the defendant, or his taking possession of the said house, provided Messrs. Combe & Co. would accept him, the defendant, as tenant to them. The plaintiff then averred, that, on the 2nd September, 1834, he gave the defendant a notice to take the house of him at the expiration of twelve months from the date of the agreement, and to pay him the 500*l.*, &c., provided Messrs. Combe & Co. would accept the defendant as tenant to them, and alleged that the defendant, although requested, did not nor would at any time ask the said Messrs. Combe & Co. to accept him as their tenant of the said house, or make any effort or attempt to cause them to accept him as their tenant, as he ought to have done, within the true intent and meaning of the agreement, &c.; and that although the plaintiff was ready and willing, and offered to cause the licence to be transferred to the defendant on his taking possession of the house, on the terms mentioned in the agreement, and to perform the agreement on his part, &c. &c., the defendant did not take the house of the plaintiff, or pay him the 500*l.* for the goodwill, or take the furniture, &c., or any part thereof, &c. &c.—There was also a count on an account stated.

Pleas, first, non-assumpsit; secondly, that the defendant did, after the plaintiff gave him the said notice, and after he requested him so to do, and within twelve months after the making of the agreement, to wit, on the 4th September, 1834, and on divers other days and times after—

wards, ask and request Messrs. Combe & Co. to accept him, the defendant, as their tenant of the said house, and did on those occasions make every effort and attempt to cause them to accept him as their tenant, as he ought to have done, within the true intent and meaning of the agreement; but that Messrs. Combe & Co. did not nor would then, or at any time before or since, accept the defendant as their tenant of the house; concluding to the country: whereon issue was joined.

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At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last term, the plaintiff having proved the agreement, the giving of the twelve months' notice, and payment to the defendant of the 600*l.* mentioned in the agreement, called also, for the purpose of disproving the plea, the confidential managing clerk of Messrs. Combe & Co., who proved the receipt by him of a letter from the defendant, dated 4th September, 1834, requesting to be informed whether they had any objection to accept him as a tenant for the house in question, or any other of their houses; to which the witness returned an answer, stating that it was necessary to have an interview before any thing could be settled respecting the house in question. The defendant never made any other application to him, but his brother-in-law, one Wisby, when at Combe & Co.'s brewery on other business, had several times asked the witness whether they would accept the defendant as tenant, and he had always told him he could give no answer without seeing the defendant. On cross-examination, the witness stated that Combe & Co. would have required an increased rent for the house, and that several persons applying for it were refused. The Lord Chief Baron intimated that he was disposed to think the declaration defective, for not alleging that Combe & Co. would have accepted the defendant as their tenant; the allegation in the plea that they would not, was not a denial of any fact alleged in the declaration; and he stated that, it

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having been proved that Combe & Co. would not have accepted the defendant as their tenant at the same rent, he should direct the jury that the defendant was not bound to take the house of the plaintiff at an increased rent. The plaintiff's counsel thereupon elected to be nonsuited the Lord Chief Baron reserving leave to the plaintiff to move to set aside the nonsuit, and enter a verdict.

Kelly now moved accordingly.—The evidence negatived the allegations of the plea. The defendant did not allege in his plea as a fact, that Combe & Co. would not accept him as their tenant, except at an increased rent. It is true there was nothing in the agreement which bound the defendant to become tenant at an increased rent. The plea, however, avers that he used every effort in his power to induce Combe & Co. to accept him as tenant. [*Parke, B.*—The onus is on you, not on the defendant: he merely denies your allegation, that he did not make any effort to become tenant, as he ought to have done.—*Alderson, B.*—It does not depend on the mere form of the issue, on whom the onus of proof lies; while a party merely denies an allegation of the other party, although in form the affirmative of the issue is on the former, the burden of proof is not necessarily so.] In declaring on this contract, it was not necessary to allege that Combe & Co. were in fact willing to accept the defendant as tenant. That question, however, does not now arise; the defendant has taken upon himself to affirm that he did use all due diligence to become tenant. [*Parke, B.*—He affirms it, in denial of your allegation that he did not.—*Alderson, B.*—The question is, whether the evidence justified the plaintiff in making his negative allegation; if he makes it, the defendant must meet it by an affirmative allegation, but it does not therefore follow that he is bound to prove it.] The evidence went either in proof of the plaintiff's negative allegation, or in disproof of the plea,

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and all debts due to the partnership, to the defendant, on the terms and conditions thereafter mentioned, the defendant covenanted that he would, on or before the 31st of December, 1836, pay the plaintiff the sum of 70*l.* as a salary for his services as shopman up to that time, or a proportionate part thereof in case the plaintiff should leave the service before that day, and also would at any time thereafter, on receiving six months' notice from the plaintiff, pay him the sum of 600*l.*, and allow him interest in the mean time at the rate of 5*l.* per cent per annum, to be paid in addition to his salary of 70*l.* The declaration then averred that the plaintiff had given the six months' notice, and alleged as a breach the non-payment of the 600*l.* and interest.

Plea, except as to 11*l.*, parcel, &c., actionem non, because the defendant says that, long before the commencement of this suit, to wit, on the 8th of October, 1833, the plaintiff made his promissory note in writing, and thereby, six months after demand, promised to pay to Mary James, or bearer, 300*l.* for value received, with lawful interest, to be paid every six months; and the said Mary James, before the commencement of this suit, to wit, on &c., delivered the said note to the defendant, who, at the time of the commencement of this suit was, and still is, the bearer and holder thereof; that on the day and year last aforesaid, the said Mary James did demand of the plaintiff payment of the said interest to be made in six months after that demand, and that six months after that demand had elapsed before the commencement of this suit. The plea then alleged the same facts as to another promissory note for 300*l.*, dated 29th of October, 1833, given by the plaintiff to one Mary Smith; and proceeded to aver that the plaintiff was indebted to the defendant in the sum of 650*l.*, upon and by virtue of the said promissory notes; and in 700*l.* on an account stated, and in 50*l.* for interest; and offered to set off those sums against the damages mentioned by the plaintiff, except as to the sum of 11*l.*

parcel &c. And the defendant then pleaded payment of that sum into Court.

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To the first plea the plaintiff replied, that the said two promissory notes were not, nor was either of them, given in manner and form, nor was the plaintiff indebted to the defendant in manner and form, as in the plea alleged: on which issue was joined. To the second plea there was a replication of damages ultra.

At the trial before *Gurney, B.*, at the Middlesex Sitings after last Easter Term, the deed of dissolution having been put in and read on the part of the plaintiff, for the defendant, the two promissory notes stated in the plea were produced. It appeared that on the plaintiff and defendant entering into partnership, as linen-draper, at Richmond, in October 1833, the plaintiff borrowed from Mrs. James and Mrs. Smith, the payees of the notes, the sum of 600*l.*, for which he gave these notes of 300*l.* each as a security, and paid that sum to the defendant as a premium. It was proved that about the period of the dissolution of the partnership, Mrs. James applied to the plaintiff to let her give up his note, and take the defendant's instead. The plaintiff said he would consult his solicitor, and ultimately refused the proposal. Mrs. James, in the interim, gave him notice to pay the money at the six months' end: and she subsequently indorsed and delivered the note to the defendant, who continued the business alone. Mary Smith, the payee of the other note, was then called to prove the transfer of that also to the defendant; and being examined on the voir dire, said that she did not expect the bill back; that she expected to receive her 300*l.*, and interest, but did not wish to take it out of the business; that the note now belonged to the defendant, but she still expected to receive the money. The plaintiff's counsel objected that she was not a competent witness, on the ground that she was interested in the

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event of the suit; as it appeared that she had parted with the note, but was not to receive any consideration for doing so, unless the defendant was allowed to keep the money in the business, which he would not be, if compelled in this action to pay the 600*l*. The learned Judge however admitted the evidence; and the witness proved the loan of the money to the plaintiff on the note, the demand of payment from him, and the indorsement and delivery of the note to the defendant. For the plaintiff, it was contended that the transfer of the notes was merely colourable, and that the defendant was not the bonâ fide bearer or holder of them. The learned Judge, however, expressed his opinion, that, as between the plaintiff and defendant, the latter was entitled to set them up, and under his direction a verdict was found for the defendant: the difference in amount between the interest due on the covenant and on the notes respectively, being covered by the sum paid into Court.

In Trinity Term, *Platt* obtained a rule nisi for a new trial, on the ground that the witness Mary Smith was incompetent: against which

Barstow now shewed cause.—The witness was rightly received, for she stood perfectly indifferent between the parties to the action. The apparent difficulty arose merely from the ambiguity of her answers on the voir dire, that she wished the money to remain in the business, and considered the note to belong to the defendant. But the effect of the whole transaction was, that the defendant would be bound to give her back the note, if he failed to establish his set-off in respect of it; so that she would have her remedy either against the plaintiff on the note, or against the defendant in pursuance of the arrangement between herself and him; and thus stood quite indifferent.

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result of this action. The witness stands, therefore, quite indifferent: it is wholly immaterial to her whether the defendant, or any body else, gives six months' notice to the plaintiff or not.

The other Barons concurred.

Rule discharged.

M'DOWALL v. LYSTER.

In an action on a banker's cheque, the Court refused leave to add a plea, (the time for pleading having expired) that it was drawn by the defendant more than 15 miles from the place where it was made payable, and falsely dated, in contravention of the 9 Geo. 4, c. 49, s. 15.

ASSUMPSIT against the drawer of a banker's cheque; to which the defendant pleaded, that it had been given to secure a gambling debt, and that the plaintiff was a holder of it without consideration.

Sewell moved for leave to add a plea, that the cheque was drawn at a distance of more than fifteen miles from the place at which it was made payable, and was falsely dated, in contravention of the provisions of the 9 Geo. 4, c. 49, s. 15. The time for pleading had expired.

Per Curiam.—The Court will not interpose to assist the defendant in defeating an instrument which he has knowingly executed in an illegal manner. If he wished to raise this defence, he should have pleaded that he did not make the cheque declared on (*a*).

Rule refused.

(*a*) See *Dawson v. M'Donald*, ante, p. 26.

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In Trinity term, a rule nisi was obtained for a new trial, on the ground of misdirection, or to set aside the proceedings as having been coram non judice, the case not being one which was triable before the sheriff under the 3 & 4 Will. 4, c. 42, s. 17.

J. W. Smith now shewed cause, on an affidavit stating that the order for the writ of trial was obtained on the application of the plaintiff.—As to the objection that the proceedings were coram non judice, if the Court had no jurisdiction, they were altogether a nullity; there could therefore be no nonsuit which could prejudice the plaintiff. The more regular form of motion would have been to set aside the writ, and not the subsequent proceedings, which were regular, if the writ itself is so. But it was a case within the statute, for the action was in substance for the price of the pony. It is quite different from *Watson v. Abbot* (a), which may be referred to on the other side, and which was an action *on the case* for negligence in running down a boat.

With regard to the objection as to misdirection, he insisted that the plaintiff could not avail himself of that: the only affidavit in support of the rule, of what took place at the trial, was made by the clerk to the plaintiff's London agent, who was not present at the trial, and did not state from whom he received his information, or account for the absence of any affidavit by a person present at the trial (b). And the Court held that this affidavit could not be made use of, and that it was now too late to apply to the under-sheriff for a report of what took place.

(a) 2 C. & M. 150; 2 Dowl. P. C. 215.

(b) The under-sheriff's notes did not state the grounds on which he nonsuited; and the Court said that it was very reprehensible

conduct to try a cause without taking proper notes, and thus to leave the parties to squabble on affidavits as to what took place at the trial.

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HAYTER v. ELEANOR MOAT, Administratrix of THOMAS MOAT, deceased.

Where separate damages are assessed on each count of the declaration, if one count is bad, the judgment will be arrested on that count only.

The want of an allegation of a promise to pay, in an indbitatus count, is not supplied, even after verdict, by a plea of non-assumpsit pleaded to the whole declaration; nor by the statement at the commencement of the declaration, that the defendant was summoned to answer in an action on promises, or the conclusion, that "in consideration of the premises respectively before-mentioned, the defendant promised to pay, &c.," such promise being confined in its terms to other counts.

ASSUMPSIT.—The first and second counts were on two bills of exchange for 100*l.* each, dated the 3rd and 31st of August, 1835, drawn by the plaintiff upon, and accepted by, the intestate, Thomas Moat, payable respectively three and two months after date. The four following counts were for goods sold and delivered, work and labour and materials, money paid, and on an account stated; a promise to pay the several sums in those counts mentioned being stated by the intestate in his lifetime, and a breach in non-payment of them by the intestate, or by the defendant, administratrix as aforesaid. The seventh count stated, that, after the death of the said Thomas Moat, to wit, on the 1st of March, 1836, the defendant, as administratrix, was indebted to the plaintiff in 200*l.* for the work and labour, care, diligence, and attention of the plaintiff, as an undertaker of funerals, done, performed, and bestowed by the plaintiff and his servants in and about the funeral of the said T. M., on the retainer and at the request of the defendant, as administratrix as aforesaid; and for divers hearses, coaches, horses, materials, and other necessary things used and applied in and about the furnishing and conducting of the said funeral, by the plaintiff found and provided for the defendant, as administratrix as aforesaid, and at her request. The eighth and ninth counts were for goods sold and delivered by the plaintiff to the defendant as administratrix, and on an account stated between the plaintiff and the defendant as administratrix; and the declaration concluded with the following breach:—that the defendant, as administratrix as aforesaid, afterwards, to wit, on &c., in consideration of the premises respectively last mentioned,

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that the seventh count was bad, by reason of no promise to pay being alleged in or with relation to it; secondly, that it was improperly joined with the other counts.

Platt and Russell Gurney shewed cause.—Under the circumstances of these pleadings, the only issue for trial was as to so much of the plea of non assumpsit to the residue of the declaration as applied to the seventh count; together with the assessment of damages on the other counts (the eighth excepted). Then, the arbitrator having assessed the damages separately, even if one count is bad, the Court will not arrest the judgment in toto, but only on that count. But it is submitted that the seventh count may be sustained. The promise to pay is nothing but the formal inference of law from the consideration stated, viz., the work and materials supplied to the defendant; and though the formal assumpsit is omitted, the defect may be considered as being supplied and amended by the plea of non assumpsit. When the defendant says, "I did not promise as in that count mentioned," that impliedly admits that the count contained a promise which he was bound to negative. After verdict, the Court will intend that a promise was found by the jury, by whom that was the only issue to be tried. It can hardly be requisite, after verdict, to shew that the necessary construction of the words imports a promise; if it can be implied by any means from them, the Court will intend it. For that purpose the original statement at the commencement of the declaration, that the defendant was summoned to answer in an action on *promises*, may be called in aid: then each count, by its commencement, "And whereas," &c., applies those promises to the several considerations stated in the several counts. The conclusion also, which alleges, that, "in consideration of the promises respectively last-mentioned," the defendant promised, &c., is a statement of consideration large enough to include a

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the plaintiff cure it by entering a nolle prosequi on the seventh count?] It is too late after verdict to say that he will take his judgment on a particular count, having gone down to trial without entering a nolle prosequi, and the verdict having been taken generally.

LORD ABINGER, C. B.—The arbitrator was to assess the damages in the place of the jury; we must take his certificate, therefore, as a finding of separate damages by the jury on each count. A general verdict vitiates the whole declaration, only because we cannot separate the damages, and tell how much was given on the bad count. Here that is done by the certificate.

PARKE, B.—We can arrest the judgment on the seventh count as bad, because we know what damages were given on the other counts. The Court has only to deal with the record, and the certificate is to be taken as part of the record.

Judgment arrested on the seventh count;
on the other counts, judgment for the
plaintiff.

MARSTON v. HALLS.

The notice of allowance of a writ of error precludes the plaintiff from charging a defendant in execution, though the defendant's affidavit does not state the grounds of error, or that bail has been duly put in.

PETERSDORFF moved to charge the defendant in execution.

Wordsworth opposed it, on the ground that the plaintiff had had notice of the allowance of a writ of error.

Petersdorff objected that the affidavit in opposition was insufficient, as it merely stated that a writ of error had been sued out, without disclosing the grounds of error, or stating that bail in error had been duly put in.

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dant, lived in the said realm separate and apart from the said C. W. L. J. Baron de K., as a single woman; and that the plaintiff did not give any credit to the said C. W. L. J. Baron de K., but, on the contrary, contracted with the defendant as a feme sole, and on her own credit and responsibility, and that she, the defendant, made the promise in the declaration mentioned as such feme sole. Verification. Rejoinder, that the C. W. L. J. Baron de K. is not an alien born in foreign parts, &c. &c., nor did the said causes of action accrue to the plaintiff, nor was the said promise made by the defendant, while she lived separate and apart from the said C. W. L. J. Baron de K., as a single woman, nor did the plaintiff contract with the defendant as a feme sole and on her sole credit and responsibility, nor did she make the promise in the declaration mentioned, in manner and form &c.; on which issue was joined.

At the trial before *Gaselee, J.*, at the last Sussex Assizes, it appeared that the action was brought by the plaintiff, a linen-draper at Worthing, to recover the price of goods supplied in 1833 and the two following years to the defendant, who during that period was residing in Worthing, under the name of Madame de Keverberg. The delivery and value of the goods having been proved, the plaintiff called several tradesmen, lodging-house keepers, &c., at Littlehampton and Worthing, with whom the defendant had had dealings, and from whom she had hired houses and lodgings, to prove that she had not made any communication to them of the fact of her being a married woman; and it did not appear that she had done so, except in one instance, when taking lodgings of a Mrs. Littlefield, in which she was shortly afterwards delivered of a child; when she stated that her husband was resident abroad. This evidence was objected to by the defendant's counsel, but was admitted by the learned Judge.

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ties was admissible, it could only be so on the ground of her having represented herself to them as a feme sole so as it might reach the plaintiff's ears.] It could not be necessary, in order to charge her as a feme sole, to prove that she actually made false representations that she was so: it resulted from her position and circumstances, that, if she did not state herself to be a married woman, she virtually represented herself as a feme sole. [*Parke, B.*—To make a married woman liable as a feme sole, you must prove either that the plaintiff contracted with her after notice, or that she represented herself as a feme sole. In this replication, you have taken upon you to prove the latter; you have averred that she contracted as a feme sole on her own credit and responsibility. That means that she represented herself as such by her words or her conduct. *Alderson, B.*—All that the defendant is proved to have done she would have done in either case; how does it make out affirmatively that she held herself out as a single woman? If you had averred that she dealt as a *married* woman, the evidence would equally have proved that. *Parke, B.*—Supposing the replication good, although I have a strong opinion that it is not, (because the cases in which the wife has been held liable, her husband being abroad, apply only where he is *civilter mortuus* (a);) you are bound under it to make out that the husband was an alien, that he was resident abroad, and never in this country—which facts are now admitted; and also that the defendant represented herself as a feme sole, or that the plaintiff dealt with her believing her to be a feme sole. The law does not make her liable as such, merely because her husband is an alien and continually abroad.] The law gives her the capacity to contract, and when she does contract, she becomes personally liable by reason of her

(a) See Roper's Husband and Wife, Vol. 2, p. 121.

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he having lain in prison for the costs of the cause, which were under 20*l.*, for upwards of twelve calendar months. The only question was, whether a judgment in ejectment was a judgment "for any debt or damages," within the meaning of the statute. He referred to *Doe v. ———* (a), in which *Patteson, J.*, ruled that it was, and also to another case which had recently been similarly decided by *Patteson, J.*, and *Coleridge, J.*, at chambers, and which was afterwards confirmed by the Court of King's Bench (b).

Cowling appeared to shew cause in the first instance, in case the question could be considered as open to him. [*Parke, B.*—We had little or no doubt on the subject, but the Court desired the matter to be mentioned again before the rule granted the other day was made absolute (c).]

LORD ABINGER, C. B.—Is not a judgment in ejectment for damages and costs? I do not see that its being only for a shilling damages makes any difference.

PARKE, B.—I think we must follow the record, and the judgment is undoubtedly for damages.

Rule absolute.

(a) 1 Dowl. P. C. 69.

(b) See *Doe v. Reynolds*, 10 B. & Cr. 481, *contra*.

(c) His Lordship referred to a case of *Doe d. Lord Carrington v.*

Lloyd, in which a similar rule was granted, and made absolute without argument, no cause being shewn.

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his claim. [Lord Abinger, C. B.—The defendant construes that sum to include the whole sum that ever was to be paid; and it appears to me, on the face of the certificate, that he is right. Nothing is submitted to the arbitrator but the value of the work. Gurney, B.—Surely it is the valuation of the whole work; he does not say “remaining to be paid.” Parke, B.—If you are to take the certificate literally, you are entitled to 74*l.* 7*s.* beyond the 30*l.* and the 45*l.*] It is to be construed with reference to the time of action brought, being equivalent to a verdict given by the jury. [Lord Abinger, C. B.—I think it may be collected on the face of the certificate alone, that it was meant to comprehend all that ever was payable, because else he would have deducted the 45*l.* as well as the 30*l.* Parke, B.—You did not claim the sum of 74*l.* 7*s.* at the time of the reference; then the only alternative is, that the certificate must be taken to refer to the sum due at the time of action brought, or to the whole value. Now, what is there to fix it to the time of action brought?]

Then, secondly, the certificate, not being made within the period at which the jury process was returnable, was ineffectual altogether. In such a case the arbitrator stands in the place of the jury; his award is in fact the verdict of the jury. When an order of Nisi Prius is drawn up, it is to meet this very difficulty. [Parke, B.—It is impossible that it could have been the intention of these parties that the certificate should be in place of the verdict, and be made at the same time; the arbitrator was to have a reasonable time to ascertain the amount by measure and value.]

LORD ABINGER, C. B.—I think we could not with propriety set aside the certificate for this defect, without an affidavit on your part that you withdrew from the reference on this ground.

Rule absolute.

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READE v. DUTTON and Others.

A RULE nisi having been obtained for an attachment for non-performance of an award made in this cause,

Where a cause was referred to two arbitrators, with power to them to appoint a third, the award to be made by a day named, or such other day as they or any two of them should appoint, and the two originally named enlarged the time for making the award before they appointed the third:—
Held, that this was an invalid enlargement, and that the award made by the three could not be enforced by attachment.

Wightman shewed for cause, that the appointment of a third arbitrator was invalid, and the award therefore could not be enforced by attachment. By the submission, the cause was referred to two arbitrators, with power to them to appoint a third; the award to be made "on or before the first day of Easter term then next, or on such other day as they the said arbitrators, or *any two of them*, should appoint." It appeared that the time was enlarged by the two originally named, before they appointed the third. He objected that this was not in accordance with the submission, which contemplated that there should be two out of the three to enlarge the time, not the first two only; and referred to a case of *Hughes v. Garnett* (a), in the King's Bench, Michaelmas Term, 1822, in which the point was so decided.

Chandless, in support of the rule, urged, in the first place, that the objection was too late at this stage of the proceedings. The party ought to have resisted the further prosecution of the reference, and not to have allowed the three to make the award. [*Parke*, B.—It does not follow that he may not be bound by the award, because there may have been a new submission by parol, but it cannot be enforced by an attachment.] In a case *In the matter of Hick* (b), the subsequent appearance of the parties before the arbitrators was held a waiver of a similar invalidity.

PARKE, B.—That was on an application to set aside the

(a) Not reported.

(b) 8 Taunt. 694.

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award, which makes all the difference. We cannot grant an attachment, unless the award was made in pursuance of the rule of Court.

The rest of the Court concurring,

Rule discharged.

ALDERSON v. JOHNSON.

The declaration stated in the commencement of it, that the plaintiff was a debtor to the King, &c., and concluded with the *quo minus* clause, as in the old form:—*Held*, on special demurrer, that the declaration was sufficient, as this was surplusage only, and that the proper course was for the defendant to have obtained a summons to strike out the superfluous matter.

ASSUMPSIT on a bill of exchange, in which the commencement and conclusion of the declaration were as follows:—"George Douglas Alderson, a debtor to our Lord the King, cometh before the Barons of his Majesty's Exchequer, on &c., by Joseph H. Turner, his attorney, and gives the Barons here to understand and be informed, that, since the suing out of the writ in this suit, and before this day, to wit &c., one William Bracey Kent, who was together with the said G. D. Alderson named in the said writ as a plaintiff in this suit, died, to wit &c., and the said G. D. Alderson then survived him, which the defendant doth not deny, but admits the same to be true; wherefore the said G. D. Alderson, by his said attorney, complains of William Johnson, the defendant in this suit, present here in Court the same 24th day of October, &c., in an action on promises: For that whereas, &c."—concluding "To the damage of the plaintiff of 60*l.*, whereby he is the less able to satisfy our said Lord the King the debts which he owes his Majesty at his said Exchequer, and therefore he brings his suit, &c."

Special demurrer, assigning for cause, "that the commencement and conclusion of the declaration improperly state the ancient and now abolished fiction of the plaintiff being a debtor to the King, with a *quo minus* conclusion, which was necessary to have maintained such an action in

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PUTNEY v. SWANN.

A declaration contained one count on a bill of exchange against the acceptor, and a second count on an account stated. The defendant pleaded that he did not accept the bill of exchange in the declaration mentioned, taking no notice of the count on the account stated:—*Held*, that the plea was bad on special demurrer.

ASSUMPSIT.—The declaration contained two counts. The first was on a bill of exchange, by the payee against the acceptor; the second was on an account stated. The defendant pleaded that he did not accept the said bill of exchange in the said declaration mentioned. To the second count there was no plea. Special demurrer, assigning for cause, that the plea did not answer the whole of the declaration. Joinder in demurrer.

Francillon, in support of the demurrer.—According to the ninth rule of Hilary Term, 4 Will. 4, this must be taken to be a plea to the whole declaration. That rule provides, that, “in a plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of actionem non, or to the like effect, or any prayer of judgment; and all pleas pleaded without such formal parts as aforesaid shall be taken, unless otherwise expressed, as pleaded in bar of the whole action.” [*Parke*, B.—It is “in bar of the action” instead of “the further maintenance of the action;” that is the meaning of the rule. That rule has no application to this case.] Then, according to the inclination of opinion expressed by the Court in the case of *Worley v. Harrison* (a), the plea is bad, as not answering the whole of the declaration. In giving judgment in that case, *Littledale*, J., though he spoke of another objection, on which the case was determined, says, “As to the first objection, I am disposed to think that the first plea, though it expressly refers to the first count, and answers that only, is pleaded to the whole declaration.” And *Patteson*, J., says, “I wish not to be supposed to think that it is not a good ground of special demurrer;

(a) 3 Adol. & Ell. 669; 5 Nev. & Man. 173.

since, if the first were the only plea on the record, it could hardly be considered so necessarily confined to the first count, as that the plaintiff might sign judgment for want of a plea to the second. I can conceive, though with some difficulty, a case in which a plea, in the same form as the first plea here, would answer more counts than one." [Parke, B.—Your objection is, that this plea is in form pleaded to the whole of the declaration. You say, that, "if a plea begin with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad, and the plaintiff may demur," as Mr. Serjeant *Williams* states in his notes to Saunders, 28, n. 3.] In *Vere v. Goldsborough* (a), where the declaration contained two counts, one on a bill of exchange against the acceptor, and another on an account stated; the defendant, without a rule to plead several matters, pleaded that he did not accept the bill, and for a further plea that he did not account. The Court held that the informality of omitting to confine each plea to the count to which it applied, did not authorize the plaintiff to sign judgment. There *Tindal*, C. J. says, "I think the plaintiff should have demurred specially, and not have taken upon himself to sign judgment. The defendant has fallen into a breach of the rules of pleading rather than of practice; and the question, if necessary, might have been raised upon special demurrer." Therefore the plaintiff in this case could not have signed judgment.

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Chadwicke Jones, contra.—This plea is not and does not profess to be an answer to the whole declaration; and, the second count not being answered, the plaintiff ought to have signed judgment. The case of *Vere v. Goldsborough* is anything but a decision on this point.

Francillon was heard in reply.

(a) 1 Bing. N. C. 353; 1 Scott, 265.

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LORD ABINGER, C. B.—There must in this case be judgment for the plaintiff. The plaintiff could not have signed judgment as for want of a plea, as the plea is pleaded to the whole declaration. If the defendant intended to confine his plea to the first count only, he ought to have so framed it: it must otherwise be inferred that he intends to answer the whole declaration.

PARKE, B.—This plea does not profess to be confined to one particular count, and therefore it must be taken to be an answer to the whole declaration. The object of the ninth rule has been misconstrued, and I am satisfied it has no bearing on such a case as the present. Its object was to prevent unnecessary statements being made in the introductory parts of the pleadings. It is to be understood as applying to a plea pleaded in bar of the whole action, as contradistinguished from a plea in bar of the further maintenance of the action. It did not mean to affect the ordinary rules of pleading.

ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

BROOKS v. ELKINS.

An instrument in the following form, "11th October, 1831. I. O. U. 20*l.*, to be paid on the 22nd inst., W. B.," requires a stamp, either as a promissory note, or as an agreement for the payment of money above the value of 10*l.*

ASSUMPSIT for money due from the defendant to the plaintiff. The defendant pleaded a set-off.

At the trial before Lord Abinger, C. B., at the London sittings after last Trinity Term, the defendant, to prove his set-off, gave in evidence the following document:—

"11th October, 1831.

"I. O. U. 20*l.* to be paid on the 22nd instant.

"W. BROOKS."

It was objected that this was not admissible in evidence,

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HEALE v. CURTIS.

Where issue was joined in vacation, but no notice of trial given (it not being shewn that it was a country cause); —*Held*, that it was too early to apply for judgment as in case of a nonsuit in the next term but one after issue joined.

IN this case *Thomas* had obtained a rule for judgment as in case of a nonsuit.

Mellor shewed cause.—*Wingrove v. Hodgson* (a) is an authority that this application was made too early. Here issue was joined on the 10th of May, which was in the vacation after Easter Term, and no notice of trial has been given. The plaintiff is therefore too early in applying for judgment in Michaelmas Term.

Thomas, contra.—It was held in *Williams v. Edwards* (b), that, in a country cause, where issue is joined in Easter Vacation, the defendant may move in Michaelmas Term for judgment as in case of a nonsuit. It does not appear that this is not a country cause.

Lord ABINGER, C. B.—It is not shewn that it is a country cause. The application is too early.

Rule discharged.

(a) 2 Dowl. P. C. 379.

(b) 1 C. M. & R. 583.

REED v. SPURR, Administrator.

A plea of plene administravit does not require to be signed by counsel.

TO an action of assumpsit, the defendant pleaded plene administravit, but the plea was not signed by counsel, and the plaintiff signed judgment.

Mansel now moved to set that judgment aside for irregularity.—He referred to Tidd's Practice, 9th edit. 671, to shew, that, according to the practice of the Court of

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CLARK v. CHAMBERLAIN.

A vessel having run ashore on the coast of Essex, was assisted by the owner of a smack, who put down an anchor and a hawser attached to the vessel for the purpose of securing her. The smack then left her for the purpose of carrying away some of her stores, with the intention however of returning. The owner of another smack came to her afterwards, and finding no one in or near the vessel, and her deck under water, took away the anchor and hawser, and delivered them up to the deputy vice-admiral of Essex:—*Held*, that the anchor and hawser were not parted with, or left and abandoned, within the meaning of the 1 & 2 Geo. 4, c. 75, s. 1. and that the deputy vice-admiral was not justified in detaining them until salvage was paid, or security given for its payment.

The deputy vice-admiral, who received the anchor and hawser, alleged to have been *left* at sea, from the finder, refused, on application by the real owner, to deliver them up until the salvage was paid, or security given for the payment of it:—*Held*, that this was a conversion: but that, if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion.

TROVER for certain goods and chattels, to wit, two anchors, two hawsers, and two cables, &c., the property of the plaintiff. Pleas—First, not guilty. Secondly, as to the said goods in the declaration mentioned, except as to one anchor and one hawser, that, the plaintiff was not lawfully possessed, as of his own property, of the goods and chattels in the declaration mentioned, or any of them, modo et formâ. Thirdly, that, before the time of the committing of the grievances in the said declaration mentioned in respect of the said anchor and hawser, parcel &c., the said anchor and hawser had been and were parted with and left by a certain ship or vessel of the plaintiff, on a certain coast of this kingdom, to wit, the coast of the county of Essex, and being so parted with and left thereupon, had been and were taken up and taken possession of at sea, on the said coast, by one Thomas Mills and other persons, who thereupon afterwards, and upon and after their arrival at a certain port in the said county of Essex, to wit, the port of Colchester, being the port at which they first arrived with such articles so found as aforesaid, and before the committing of the said grievances, as to the said anchor and hawser, parcel &c., to wit, on the day and year aforesaid, according to and in pursuance of the provisions of a certain statute passed in the session of parliament held in the 1st and 2nd years of the reign of his late Majesty King Geo. 4th, and in such case made and provided, duly delivered the said anchor and hawser into and deposited

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thereof to the satisfaction of the said salvors : which are the same supposed grievances in respect of the said anchor and hawser, parcel &c., in the said declaration mentioned, whereof the plaintiff hath above thereof complained against the defendant; and this the defendant is ready to verify, &c.

Replication to the last plea, *de injuriâ*.

The cause was tried before Lord *Abinger*, C. B., at the London sittings after last Trinity term, when it appeared, that, on the 22d of March, a brig called the *Aurora* went ashore on the *Shoeburg* or *North Land*, off the *Essex* coast, within the limits of the vice-admiralty of *Essex*. On Thursday, the 31st of March, *Thomas Mills* and *Joseph Mills* proceeded to the brig, and found her with her deck under water, attached to an anchor and hawser, but no one on board or near her. They took away, amongst other things, the anchor and hawser, and proceeded to *Wivenhoe*, and delivered them up to the defendant, the deputy vice-admiral of *Essex*; and made a report in a book kept by the defendant, and deposited them in the admiralty warehouse. The anchor and hawser were the property of the plaintiff, who was the owner of another smack, by which assistance had been rendered to the brig, and who had attached the anchor to the brig to secure her. The plaintiff had then left her for the purpose of carrying away goods from the wreck, but with the intention of returning. Whilst *Mills* was proceeding with the anchor, &c. from the wreck, the plaintiff's smack came alongside, and the plaintiff charged *Mills* with taking his anchor, and demanded to have it back; to which *Mills* replied, that he did not know whose anchor it was, that he had found it sunk with the wreck and abandoned, and he should deliver it into Court. The defendant was subsequently applied to by the plaintiff to deliver up the anchor and hawser, but he refused to do so unless the salvage was paid, or security given for its payment. These facts

having been proved, the Lord Chief Baron was of opinion that they did not support the defendant's special plea, and he directed the jury to find a verdict for the plaintiff, which they accordingly did.

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Knox now moved for a new trial, on the ground of misdirection.—First, the special plea, which was framed upon the 1 & 2 Geo. 4, c. 75, s. 1, was sufficiently proved. That statute enacts, “That all pilots, boatmen, hovellers, or other persons who shall take up any anchors, cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandise which may have been parted with, cut from, or left by any ship or vessel within any harbours, rivers, or bays, or on any of the coasts of this kingdom, whether the same ship or vessel shall be or shall have been in distress or otherwise, and which shall have been weighed, swept for, or taken possession of by any such boatmen, pilot, hoveller, or other person, shall send a report in writing of the articles so found, and stating the marks, if any, thereon, and also an accurate and particular description of the bearings, distances, and situations and time when and where the same were so found, to a deputy vice-admiral or his agent, at or near to the port or place where such boatmen, pilot, hoveller, or other person shall first arrive with such articles, within forty-eight hours after his or their arrival at such port or place, or before he or they shall leave the port, if he or they shall quit it before that time shall expire; and shall also within such period as aforesaid deliver such articles so found into a proper warehouse, or such other place as the vice-admiral of each county shall appoint, for safe custody, until the same shall be claimed by the owner or owners thereof, or his, her, or their agent or agents; and the salvage, together with such other charges and expenses as are hereinafter directed to be paid in respect of such articles, paid by him or them, or security given for the pay-

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ment thereof to the satisfaction of the salvor or salvors thereof." That act does not mean that the articles which are parted with, or *left* by any vessel at sea, must necessarily be wreck or absolutely derelict; it is sufficient if there is no one near them to take care of them. The anchor and hawser had been *left* in that sense, and therefore the defendant was justified in detaining them until salvage was paid. The plea was therefore proved, and was a good answer to the action. Secondly, there was no conversion by the defendant. The defendant is a public functionary, with duties to perform under a public act of parliament. He is required by the act to receive all goods delivered to him, and keep them in safe custody until claimed by the true owner, and the salvage paid. It is no part of his duty to determine the ownership of the goods, or whether the salvage be payable or not, as the seventh section provides that in case of dispute the parties shall go before three justices, who are to determine the matter. He was consequently justified in demanding payment of the salvage before he would deliver up the articles; and therefore it was no conversion. A demand and refusal do not necessarily amount to a conversion; they are only evidence of a conversion, and may be explained. In Buller's *Nisi Prius*, 45, this case is quoted: "A lord of a manor seized a beast as an estray, and kept it for some time after having proclaimed it. The owner afterwards, and within the year and day, claimed it, and brought trover, without first tendering a satisfaction for the keep of it; and, for want of that, it was holden that the action would not lie;" and 2 Roll's Abr. 92, is referred to. So, in *Alexander v. Southey* (a), where goods, the property of the plaintiff, had been by the servants of an insurance company carried to a warehouse, of which the defendant, a servant of the company, kept the key; and the defendant, on being applied to by the

(a) 5 B. & A. 247.

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guilty of a conversion, and would have been entitled to a verdict under the general issue. But he has taken it upon himself to determine that it is due. The hardship on the defendant arises from his own conduct, partly in pleading as he has done, and partly by his answering as he did.

ALDERSON, B.—The facts stated in the plea are, that the anchor and hawser had been parted with, and left by the ship at sea. The facts proved were, that the anchor and hawser had been taken from a vessel, and had not been left, but had been attached to her to secure her. It cannot be said that the plea has been proved to the satisfaction of the Court or jury. As to the plea of the general issue, it might have been a question whether evidence might not have been given under it to shew that the defendant had a justifiable ground for detaining the goods, if he had not insisted upon detaining them for the salvage.

LORD ABINGER, C. B.—I thought the defendant's special plea involved the question, whether the anchor and hawser were left under such circumstances as to warrant the belief that they had been abandoned by the owner. I think that is the meaning of the words *left* and *parted with*, and that they do not apply to cases like the present.

Rule refused.

SIMPSON v. HURDISS.

To a declaration for a libel, the defendant pleaded the general issue,

and two special pleas. At the trial the jury found all the issues for the plaintiff, with 1s. damages, and the judge certified under the 43 Eliz. c. 6, s. 2:—*Held*, that the plaintiff was not entitled to the costs of the issues found for him, notwithstanding the rule of H. T. 4 W. 4, s. 7.

THIS was an action for a libel, to which the defendant pleaded—first, the general issue; secondly, a special

justification; and thirdly, that it was a privileged communication. *Esch. of Pleas,*
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At the trial before *Gurney*, B., the jury found all the issues for the plaintiff, with 1*s.* damages, and the learned Judge certified under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs; whereupon the Master refused to allow the plaintiff any costs.

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Erle now moved for a rule to shew cause why the Master should not review his taxation.—The plaintiff contends that, notwithstanding the Judge's certificate, he is entitled to the costs of the issues found for him. The stat. 3 & 4 Will. 4, c. 42, s. 1, enables the Judges to make such alterations in the rules as to pleadings, and such regulations as to the costs, as they shall deem expedient; and by the 7th rule of H. T. 4 Will. 4, the defendant not succeeding upon the special pleas, the plaintiff is entitled to the costs of those issues. If the verdict had been for the defendant on the general issue, the plaintiff would have been entitled to the costs of the issues found for him. Therefore the Master was wrong in deciding that the certificate deprived the plaintiff of all costs. [*Alderson*, B.—The statute of Eliz. says, that when a Judge certifies, you shall have no more costs than damages. Lord *Abinger*, C. B.—That is a statutable limitation.]

PARKE, B.—The rule of Court is subservient to the statute of Elizabeth. It was not meant to deprive the Judge of the power to certify.

Rule refused.

M'KUNE v. SMITH.

IN this case issue was joined on the 4th of November for the second sitting in term, which was on the 22d, and the By the practice of the Courts of King's Bench and Exchequer, joined and notice
a plaintiff has not a right to enter and pass his record immediately after issue of trial given, so as to make the defendant pay the costs of it; but it is in the discretion of the Master to allow such costs or not, as he thinks fit.

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plaintiff passed the record on the 10th. On the 12th the defendant obtained an order to pay the debt and costs. The Master, on taxation, refused to allow the plaintiff the costs of passing the record, amounting to 2*l.* 0*s.* 6*d.*

Kelly, on a former day in this term, moved for a rule to shew cause why the Master should not review his taxation. The plaintiff was at liberty to enter and pass the record as soon after issue joined and notice of trial given as he thought proper. Here the plaintiff had no reason to know that the defendant had any intention of paying the debt and costs, before the record was passed.

Barstow shewed cause in the first instance.—This was a matter entirely for the Master's discretion, and he has exercised it. No better rule can be adopted than to leave these matters to the Master's discretion.

Cur. adv. vult.

On a subsequent day—

LORD ABINGER, C. B., said—We are of opinion that this was a question proper to be left to the Master's discretion, and the rule must be discharged. It appears that the practice is so in the King's Bench as well as in this Court, though in the Common Pleas, the plaintiff has a right to enter his record immediately after issue is joined. We shall take it into consideration whether we will not make some general rule on the subject.

ALDERSON, B.—We have decided on the discretion of the Master, with the exercise of which we will not interfere.

Rule refused.

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non-payment of the said sum of 500*l.* within three calendar months after the said decease of the said Thomas Sowdon had been certified to their directors as aforesaid, or at any time afterwards. Profert was then made of the letters testamentary.

Second plea.—That before and at the time of the death of the said T. Sowdon, and the proving of the said will, and of the granting the said letters testamentary produced in Court, the defendants were and from thence hitherto have been and still are resident and commorant in the city of London, and that the whole of the capital stock and funds of the said company in the said policy mentioned, were, before and at the time of the death of the said T. Sowdon, and at the time of proving the said will, and of the granting of the said letters testamentary produced in Court, and from thence hitherto have been and still are, situated, placed, located, and fixed within the said city of London; and the said defendants say, that the-said city of London, during all the time aforesaid, was and is without the diocese of Exeter, and within the diocese of London, by reason of which said several premises the proving the said will and the granting of the said letters testamentary, as far as relates to the said policy of assurance, did not in anywise belong or appertain to the said Bishop of Exeter, and the said letters testamentary produced in Court are thereby void, and of no effect against the said defendants in respect of the said sum of 500*l.*, and of all money due upon or by virtue of the said policy of assurance; and this the said defendants are ready to verify, &c.

Replication.—That the said T. Sowdon, up to and at the time of his death, dwelt and was resident and commorant within the diocese of Exeter aforesaid, to wit, at Whitstone, and there within the diocese of Exeter aforesaid died, and that the said instrument or policy of assurance in the said declaration above-mentioned, was, at

the time of the death of the said T. Sowdon, within the diocese of Exeter aforesaid, and not elsewhere, and this the plaintiffs are ready to verify, &c.

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Demurrer, and joinder in demurrer.

The point stated for argument on the part of the defendant was as follows:—The defendant means to contend that the sum due upon the policy is bona notabilia in the diocese where the funds of the insurance company are situated, and where the parties liable reside, which is admitted by the replication to the second plea to be the diocese of London; and that, therefore, the letters testamentary, &c., from the diocese of Exeter, are void as to the plaintiff's claim.

Wightman, in support of the demurrer.—The question in this case is, whether this money is bona notabilia in the diocese of Exeter, or whether it is bona notabilia in London, or elsewhere out of the diocese of Exeter. If it is not within the diocese of Exeter, then the letters testamentary are either void, or voidable only as respects this policy. The general rule is, that simple contract debts are considered to be bona notabilia where the debtor lived at the time of the death; and specialty debts are bona notabilia in the diocese where the specialty lies at the time of the death. Bacon's Abr., Executors and Administrators, E.; Roll's Abr. 908, 9; *Lunn v. Dodson* (a). There is a third case, where a charge is created by a specialty on property situated in another diocese. That is the present case, and therefore this covenant was bona notabilia in London, where the funds of the insurance company were situate, and there ought to have been a prerogative probate. [*Parke, B.*—This is the case of a covenant, which is a specialty]. It is not a contract, but a mere charge upon effects situate in London. [Lord

(a) See *Lysons v. Barrow*, 2 Bingh. N. C. 486; 2 Scott, 721.

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Abinger, C. B.—This does not give any right of execution on the funds as funds in the hands of the directors. The plaintiffs cannot issue an execution against the funds. *Parke*, B.—It is equivalent to a covenant to pay if J. S. should go to Rome. If it is not a covenant to pay, how is the action maintainable? It is not necessary now to answer that question. It may be that the action is maintainable against the directors because the funds are chargeable in their hands; but, if they had not sufficient funds, they might not be liable: therefore the question is, whether there are funds sufficient, and are they chargeable? The funds are the source from which the money is to be paid. [Lord *Abinger*, C. B.—No; they personally undertake to pay the money]. It is submitted that this is a specialty, charging effects situate in the diocèse of London, and is like the case of a lease of lands, which is considered as bona notabilia where the lands lie (a). The defendants only wish to ascertain who is entitled to receive the money.

G. T. White, *contrà*, was stopped by the Court.

LORD ABINGER, C.B.—The defendants are liable in their own persons. The policy does not give any right against the fund itself, though, if the fund should turn out to be inadequate, they might not be liable. Either the policy is utterly void, or the defendants are personally liable on the covenant. The company will be quite safe in paying the plaintiffs.

PARKE, B.—The defendants undertake by an instrument under seal that this sum of money shall be paid, if the funds prove adequate; therefore it is equivalent to a covenant to pay if J. S. go to Rome. In the case referred to of the lease, that proceeds on the ground that

(a) Com. Dig. Admor. B.

the value of the term is the assets, not the lease itself. The only available property to the testator here was the specialty.

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ALDERSON, B., and GURNEY, B., concurred.

Judgment for the plaintiff.

OWEN v. WATERS.

ASSUMPSIT on a bill of exchange, payable four months after date, by the drawer against the acceptor. The declaration was according to the form given by the rule of Trinity Term, 1 Will. 4, with the averment therein mentioned, "which period has now elapsed:" and was entitled the 25th of October. To this declaration there was a demurrer, shewing for cause that it did not sufficiently appear that the bill had become due before the commencement of the suit; and that the averment, "which period has now elapsed," ought to have been, "which period elapsed before the commencement of this suit."

Action on a bill of exchange by the drawer against the acceptor. The declaration alleged that the bill was made on the 29th of March, payable four months after date, "which period has now elapsed:"—*Held*, that the declaration was sufficient, and that it was not necessary to aver that four months had elapsed "before the commencement of the suit."

Chadwicke Jones, in support of the demurrer.—In *Abbott v. Aslett*(a), where the declaration stated the bill to be payable three months after date, and averred "which period has now elapsed," this Court intimated a strong opinion that, since the Uniformity of Process Act, that form was incorrect. There, *Parke*, B., in referring to the forms of declarations given by the new rules prior to the Uniformity of Process Act, says, "Those rules were made before the Uniformity of Process Act, 2 Will. 4, c. 39, and the forms given by them would then be correct, in actions by bill, because then the declaration in those

(a) 1 M. & W. 209.

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actions was the commencement of the suit; but that is no longer so. The suing out the writ is now the commencement of the suit, and those forms are, therefore, no longer correct." And the Court there refused to set aside the demurrer as frivolous, and recommended the plaintiff's counsel to amend the declaration. It ought to appear from the declaration that the bill was due at the time of the commencement of the action. The four months, at the end of which the bill was to become payable, may have expired before the declaration, but not before the writ was sued out.

Addison, contra.—The case cited is only an authority to shew that such a demurrer is not frivolous. The forms given by the rules in question were meant to apply to all the Courts, to the Court of Common Pleas as well as to the other Courts. In the Court of Common Pleas, and in the other Courts in proceedings by original, the declaration was never considered to be the commencement of the suit, but the writ. This declaration is in strict compliance with the form given. [*Parke*, B.—Those forms were given only by way of example, and were intended to curtail the length of the declaration]. Then they are not imperative. The plaintiff was not bound to follow the letter of the form. And, independently of those rules, the declaration is sufficient without the averment. If there is nothing on the face of the declaration to shew that the cause of action had not accrued when the suit was commenced, it is sufficient: *Lee v. Clarke* (a). In *Pugh v. Robinson* (b), the Court was astute to support the declaration on that principle. The old mode of declaring on bills before the new rules, as well by original as by bill, was, merely to state the making of the bill, the acceptance, the liability, and the

(a) 2 East, 338.

(b) 1 T. R. 116.

promise, with the common breach, without any averment that the bill had become due. [*Parke, B.*—I know I always used to aver that the bill became due before the commencement of the action; but I admit it may have been from abundant caution.] If this declaration be bad, then every declaration on the indebitatus counts, and in trover, and trespass, and many other cases, must be bad for the same cause. On the face of this declaration, there is nothing to shew that the action was brought too soon, but the contrary; for the declaration is entitled on the 25th day of October, and it states that the bill was made on the 29th of March, and was payable four months after date. It would therefore be due on the 1st of August, which was long before the title of the declaration. The record of the issue, if properly made up according to the rule of Hilary Term 4 Will. 4, will shew when the writ issued, and that it was after the bill became due, the writ having in fact been issued on the 16th of August. Hence, if the Court decide that the declaration is bad, there will be this inconsistency, viz., that the declaration is bad per se, but will be good on the whole record, and on error the date of the writ would appear on the face of the record. [*Parke, B.*—The declaration does not state the date of the bill, and non constat but that the date was after the drawing of the bill, and therefore the bill may not have become due until after the writ issued.] *Primâ facie*, the bill must be taken to bear date on the day it was drawn. [*Parke, B.*—Have you any authority for that? In *Coxen v. Lyon* (a), the date of a bill of exchange appeared to be different from the day on which it was alleged to have been made, and *Thompson, B.*, held that it was not a fatal variance]. The doctrine is so stated in Bayley on Bills, and the cases of *De la Courtier v. Bellamy* (b), and

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Hague v. French (a), are there cited. *Hunt v. Massey* (b) goes to the same point.

C. Jones was heard in reply.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

LORD ABINGER, C. B.—There was a case of *Owen v. Waters* argued in the course of this Term, before my Brothers *Parke, Alderson, Gurney*, and myself. The case turned on two questions; first, whether the day on which the bill bore date was to be taken to be the day on which it was stated to have been made; and secondly, whether it sufficiently appeared upon the face of the declaration that the bill was due before the time when the action was commenced. The Court have looked into the cases that were cited on the argument, and they think Mr. *Addison* was correct in his mode of stating the form of pleading; and, first of all, they will not sanction any proposition that the right of action should be shewn to have accrued at any time prior to its commencement, except it appears from the declaration itself. In other words, the Court does not look out of the declaration in order to see whether the action was commenced before the declaration was filed. To illustrate this, we have only to look to the form of pleading in respect of the Statute of Limitations. If you plead the Statute of Limitations, it always applies to the declaration, and the plaintiff replies, and shews the writ was sued out before. If it appears on the face of the declaration that the action was commenced and the first writ sued out before such right of action had accrued, that would be wrong; but you are not to intend that, to make a declaration bad. We also think, though it may be true that you may offer any evidence to shew the truth, where it is said

(a) 3 Bos. & Pul. 173.

(b) 5 B. & Ad. 902.

that a bill is made to appear dated unfairly—to shew that it really was dated on a particular day; yet so long as that remains without explanation, we may very fairly suppose the bill bears date the day on which in the declaration it is stated to be made. Therefore, on both grounds it appears to us that the declaration is good, and that the defendant has no ground of demurrer.

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Judgment for the plaintiff.

MORANT v. SIGN.

TROVER.—The declaration stated that the plaintiff was lawfully possessed, *as of his own property*, of certain goods and chattels, to wit, one oak tree, one piece of timber, two cart loads of bushes, and five cwt. of bark, which he casually lost, &c., &c.

Plea—That, before the said time when &c., to wit, on &c., he, the defendant, was seised in his demesne as of fee, of and in a certain close called Colehayes, situate &c., abutting towards the north on a certain other close of the defendant called Smith's Meadow, towards the east on a certain fence separating the said first-mentioned close from a certain close called Mill Mead, and towards the south on a certain bank of a certain mill-stream; and being so seised, he, the defendant, on the day and year last aforesaid, cut down one oak tree, one other tree, and, two cart loads of bushes, then respectively growing and being in and upon the said first-mentioned close, and then cut and stripped from the said other tree five cwt. of bark, which oak tree, bushes, and bark, and which other tree so stripped of its bark as aforesaid, are the same goods and chattels in the said declaration mentioned. And the defendant further says, that afterwards and before the said time when &c., to wit, on the day and year last aforesaid, he, the defendant, delivered the said goods

Trover for an oak tree, the property of the plaintiff. Plea, that the defendant was seised in fee of a close, and, being so seised, he, the defendant, cut down the tree, which he afterwards delivered to one Richard Roe, to be kept for the use of him the defendant; and that the said R. R. afterwards delivered it to the plaintiff, whereupon the defendant took it out of the possession of the plaintiff, as he lawfully might do for the cause aforesaid, which was the same conversion in the declaration mentioned:—*Held*, on special demurrer, that the plea was good.

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and chattels to one Richard Roe, to be kept by the said Richard Roe to and for the use of him the defendant; and the said Richard Roe afterwards and before the said time when &c., to wit, on the day and year last aforesaid, delivered the said goods and chattels to the plaintiff; whereupon the defendant, at the said time when &c., took the said goods and chattels from and out of the possession of the plaintiff, as he lawfully might do for the cause aforesaid, which is the same conversion and disposition in the said declaration mentioned. And this the defendant is ready to verify, &c.

Demurrer, assigning the following causes. That the plea in effect amounts to a denial of the right of property in the plaintiff of the goods and chattels in the declaration mentioned, and ought to have been so pleaded in form, and to have concluded to the country; that the statement in the said plea respecting the conversion of the said goods and chattels cannot be put in issue by the plaintiff; that the facts disclosed by the plea are not inconsistent with the right of property of the said goods and chattels being in the plaintiff at the time of the conversion thereof, as stated in the plea; and that the said plea does not sufficiently or properly confess and avoid.

Barstow, in support of the demurrer.—This would clearly have been a bad plea at common law. [*Parke*, B.—The plea would have been bad before the new rules, as not confessing a conversion. But do not the new rules make all the difference?] The practice of giving express colour is an anomaly which ought not to be extended to actions of trover. In those cases in which express colour is allowed to be given, the colour cannot be traversed; and, if the plaintiff had taken issue upon the delivery to Richard Roe, he would have been told that by the introduction of the name of that fictitious personage, he had notice that the allegation was a mere fiction, which ought not to be

traversed (a). The defendant might at once have denied the plaintiff's property in the trees. This is a mere struggle for the affirmative of the issue at *Nisi Prius* (b): and the defendant ought not to be allowed to lengthen the pleadings, and turn the affirmative of the issue, by the insertion of mere matter of fable. Nor is the case altered by the new rules, which state that "in an action on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement;" that "no other defence than such denial shall be admissible under that plea;" that "such plea in an action for converting the plaintiff's goods shall operate as a denial of the conversion only, and not of the plaintiff's title to the goods;" and that "all matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*." [*Alderson*, B.—This plea is according to the spirit of the new rules, as its effect is to bring the point in dispute between the parties to a nearer issue. The defendant says that the trees do not belong to the plaintiff, and he states *why* they do not]. The plaintiff is compelled by this mode of pleading to take issue upon the *seisin in fee*. [*Parke*, B.—Is there anything in the new rules of pleading to prevent the giving

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(a) Though the reason why the opposite party shall not traverse the express colour given is not stated in the books, it would appear to be this; that by denying the matter alleged by way of colour, the facts of the case would stand still more strongly against the traverser. Thus, if in the principal case the plaintiff had denied the delivery to Richard Roe, he would have left the title of the defendant to the trees unimpeached, and would, in effect, have

admitted that he had brought an action against the defendant for converting his, the defendant's, own trees.

(b) If the plaintiff had declared in trespass *quare clausum fregit*, he would have directly raised the real point in dispute. The defendant must have denied the plaintiff's possession of the close, and the affirmative of the issue would have been on the plaintiff, who would then have obtained the opening and the reply.

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of colour? This plea appears to me to be in furtherance of the object of the new rules]. Though nothing is said in the new rules about colour, yet as matters in confession and avoidance in case are to be pleaded *as in actions in assumpsit*, it may be inferred that there was no intention to enable defendants to give express colour, that being never done in assumpsit. [*Alderson*, B.—What is meant by that rule is, that a defendant must plead upon the same principle of stating expressly the special matters of defence. *Parke*, B.—There is no doubt the plea is good].

Barstow then prayed leave to amend upon payment of costs, which was granted.

Leave to withdraw demurrer and reply, on payment of costs (a).

Manning appeared in support of the plea.

(a) And see *Carr v. Hincliff*, 10 Co. Rep. 88; 90, a.; 91, b.; 4 B. & Cr. 547; 7 Dow. & Ry. 6 Nev. & Man. 280, n.; *Tunmo* 42; *Maggs v. Ames*, 1 M. & Payne, v. *Morris*, 2 C. M. & R. 298; 294; 4 Bingh. 470; *Paramore v. Solly v. Neish*, Ibid. 355; Com. *Johnson*, 1 Ld. Raym. 566; *Hal-* Dig. tit. Pleader, (E) 13, 14; *lot v. Birt*, 1 Ld. Raym. 218; Ibid. (3 M) 40, 41. *Skinner*, 674; *Dr. Leyfield's case*,

TURQUAND and Others, Assignees of WILLIAM KNIGHT,
a Bankrupt, against JOHN KNIGHT.

TROVER for the lease of a public-house, dated the 26th of August, 1835, granted by one Calvert to William Knight, the bankrupt.

Trover for a lease by the assignees of a bankrupt.—Plea, that before the bank-

ruptcy the bankrupt deposited the lease with the defendant as a collateral security for money which the bankrupt then owed him. At the trial, the plaintiffs attempted to shew that the lease was deposited after the act of bankruptcy, and for that purpose called a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and had been applied to by him to raise him money. It was then proposed to ask him whether the bankrupt had not the lease in his possession at that time:—*Held*, that this was privileged from disclosure, as being a confidential communication made to him relative to his character as an attorney.

Pleas, first, not guilty; secondly, that the plaintiffs were not possessed of the lease as of their own property; thirdly, that the said William Knight, before he became bankrupt, to wit, on the 28th of September, 1835, deposited the said lease with the defendant as a collateral security for the repayment of the sum of 850*l.*, in which sum he the said William Knight was then indebted to him the defendant.

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Replication to the last plea, *de injuriâ*.

At the trial before Lord *Abinger*, C. B., at the London Sittings after last Hilary Term, it was proved that the fiat of bankruptcy was issued against William Knight on the 19th of December, 1835, within two months after the act of bankruptcy. The case on the part of the plaintiffs was, that the lease had been deposited with the defendant after the act of bankruptcy was committed; and for the purpose of shewing this, they called a witness, who stated that he had been the attorney for William Knight in the month of November, 1835, and that Knight had applied to him to procure him the loan of a sum of money. The plaintiffs' counsel then proposed to ask him whether the bankrupt had not the lease in his possession at that time, and whether he had not brought it to him for the purpose of raising money upon it. It was objected, that the witness having been the bankrupt's attorney at the time, the communication to him was confidential, and he therefore could not be allowed to answer the question. The Lord Chief Baron ruled in favour of the objection, and the evidence was rejected. A verdict having been found for the defendant,

Sir *F. Pollock*, on a former day in this term, moved for a rule to shew cause why there should not be a new trial, on the ground that the evidence had been improperly rejected. Where an attorney is employed merely to raise money, that is not such an employment as brings him

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within the rule as to confidential and privileged communications. It is admitted that if the communication had relation to the proper business of an attorney, it would be protected; but here he was acting in the character of a *scrivener* only. [Lord *Abinger*, C. B.—He said, “I was at that time defending several actions for him (the bankrupt).” Alderson, B., referred to *Cholmondeley v. Clinton* (a). Parke, B., referred to *Wheatley v. Williams* (b), and the judgment of Lord *Brougham* in *Greenough v. Gaskell* (c), and observed, “Suppose the lease came into his hands in order to prepare a security for money already agreed to be advanced, you would say that it was brought to him in the character of an attorney. If he were merely a licensed conveyancer, it would be difficult to say that he would be privileged.”]

Lord ABINGER, C. B.—The Court will look into the cases decided on the subject, but the inclination of their opinion is against you.

Cur. adv. vult.

On a subsequent day,

Lord ABINGER said,—In this case a motion was made for a new trial, on the ground of the rejection of the evidence of an attorney. The Court were at the time strongly inclined to hold that the evidence had been properly rejected, but wished to look into the cases, and particularly that of *Greenough v. Gaskell*, where Lord *Brougham* went through all the authorities. We have since done so, and we find the greater weight of authority is in favour of the rejection of the evidence. As to the point of this document being brought to the witness in his character of a scrivener, Lord *Nottingham* laid it down (d) that he would not compel a *scrivener* to disclose the communications made to him.

(a) 19 Ves. 268.

(b) 1 M. & W. 533.

(c) 1 Mylne & K. 98.

(d) *Harvey v. Clayton*, 2 Swans-
ton, 221, n. See also *Anon.* Skin-
404.

ALDERSON, B.—The rule seems to be correlative with that which governs the summary jurisdiction of the Courts over attornies. In *Ex parte Aitken* (a), that rule is laid down thus:—"Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not interfere in a summary way to compel him to execute faithfully the trust reposed in him. But where the employment is so connected with his professional character, as to afford a presumption that his character formed the ground of his employment by the client, there the Court will exercise this jurisdiction." So, where the communication made relates to a circumstance so connected with the employment as an attorney, that the character formed the ground of the communication, it is privileged from disclosure.

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Rule refused.

(a) 4 B. & Ald. 49. See also *Ex parte Yeatman*, 4 Dowl. P. C. 309.

KNIGHT v. TURQUAND.

TRESPASS for breaking and entering the plaintiff's house, and carrying away his goods.—Plea, not guilty. The action, which was tried before Lord Abinger, C. B., at the last Surrey assizes, was brought against the defendant, the official assignee appointed under a fiat in bankruptcy issued against the plaintiff, a livery stable keeper in the Borough, for the purpose of trying the validity of the fiat. Proof having been given of the defendant's interference in the sale of the plaintiff's stock, in December, 1835, and that the catalogues of sale bore a reference to him as official assignee, it was objected for the defendant, that the action ought, under the 6 Geo. 4,

The official assignee in bankruptcy is not within the protection of the 6 Geo. 4, c. 16, s. 44, and is not therefore entitled to notice of action by the alleged bankrupt for seizing his goods under the fiat.

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c. 16, s. 44, to have been brought within three months after the seizure of the goods, whereas the writ was not sued out until the 24th June last; and his Lordship being of that opinion, directed a nonsuit.

In this term, *Platt* obtained a rule nisi for a new trial, citing *Carruthers v. Payne* (a), *Edge v. Parker* (b), and *Worth v. Budd* (c), as authorities that the protecting clause in question did not apply to actions against assignees chosen by the creditors, and contending that the official assignee stood in this respect in the same situation: *Munk v. Clark* (d).

Thesiger and *W. Clarkson* now shewed cause.—The question to be decided in this case is one of considerable importance, and has never yet been directly before any of the Courts; viz., whether an official assignee stands in a different character and situation from an ordinary assignee, and whether an act done by him in his official capacity is not an act done in pursuance of the Bankrupt Acts, so as to come within the protection of the 6 Geo. 4, c. 16, s. 44. It must be admitted that the cases referred to on the other side have established that acts done by the ordinary assignees of a bankrupt are not acts done in pursuance of the statute, but in virtue of their right of property. That question, however, has never been considered with reference to the new rules, which, if this clause affords assignees no protection, will compel them in all cases to plead specially, and shew all the facts on the record. But the case of an official is altogether distinct from that of a general assignee. The official assignee derives his authority from the 1 & 2 Will. 4, c. 56: by the 22d section of which the Lord Chancellor is empowered to choose

(a) 5 Bingh. 270; 2 Moo. & P. 420.

(b) 8 B. & Cr. 697.

(c) 2 B. & Ad. 177.

(d) 10 Bing. 102; 3 Moo. & Sc. 463; 2 Bing. N. C. 299; 2 Scott, 475.

a number of persons, qualified as therein mentioned, not exceeding thirty, to act as official assignees, of whom one is to be selected by the Court of Bankruptcy to act in each fiat. Sect. 23, which directs that the official assignee shall not interfere as to the time and manner of the sale of bankrupts' property, was relied on at the trial, and it was said the defendant had interfered in a manner which the act did not authorize, and was therefore liable at all events. But the act does not prevent the official assignee from being present at the sale to see that it is conducted properly, the time and manner of it having been directed by the creditors' assignees. The point in dispute therefore is, whether the official assignee is not the officer of the Court—like the messenger—performing every act he does under the authority of the statute. Sect. 60 expressly describes him as the officer of the Court—directing that no judge, commissioner, &c., official assignee, *or other officer*, shall be capable of sitting in parliament. The provisional assignee of the Insolvent Debtors' Court is the officer whose situation and duties furnish the closest analogy to those of the official assignee in bankruptcy. He also is appointed by the Court, to take assignments from insolvents, and to make assignments to the general assignees; a mere instrument for the purposes of the Court, having no discretion of his own to exercise. The general assignees have a discretion to exercise in their dealings with the property—the official assignee has none; he must remain the depositary of the whole property, until assignees are chosen by the creditors; and over that choice the Court has no control: whereas the official assignee is directly appointed by the Court, and is to give security to the judges, and be subject to such rules, and act in such manner, as they shall from time to time direct, so that every act he does is in truth done under the direction and authority of the Court. [*Alderson, B.*—That is after the bankruptcy; but he has no authority to seize

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the goods of a person not a bankrupt. *Parke, B.*—The provisional assignee under the old law was precisely in the same situation as the official assignee is now.] The provisional assignee did not derive his existence and authority from the statute, but merely from the appointment of the Court. [*Parke, B.*—And the Court *selects* the official assignee out of the list.] Within what period is an action against him limited, if not by this clause? [*Parke, B.*—To six years from the seizure.] Within that time the creditors' assignees may have received and disposed of the whole property, and yet the bankrupt is to be permitted after all to sue the official assignee, and say there is no bankruptcy. When the cases relied on by the other side were decided, the assignees had no authority but by the assignment, and the right of property thereby vested in them; that is a case quite distinguishable from that of a party expressly authorized by and acting under the statute. The creditors' assignees have, moreover, a personal interest in the property which the official assignee has not; and to hold him liable to such actions, for so long a period, will necessarily have the effect of encouraging great laches in the management of the property by these officers. In *Munk v. Clark* (a), which will be referred to, the point was not distinctly raised or decided. [Lord *Abinger, C. B.*—I think I should not have nonsuited, if the cases which have now been cited had been brought to my attention. I acted upon the constant practice for assignees to plead the general issue. If the decisions are in conformity with the act, it follows that all that practice was wrong].

Platt, in support of the rule, referred to the subsequent discussion in the case of *Munk v. Clark* (b), as shewing

(a) 10 Bing. 102; 3 Moo. & Sc. 463. But see the latter report. (b) 2 Bing. N. C. 299; 2 Scott, 475.

that the clear opinion of the Court was, that the protection did not extend to an official assignee.

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LORD ABINGER, C. B.—I think the cases referred to are binding upon us: there seems to me to be no distinction between the case of an official assignee and that of the creditors' assignees: what is a good ground of decision in the case of the general assignee is good for the other. It may be observed, that the words giving the protection are not the same as in the statute of James I., although most probably the framer of the act intended that they should have the same effect. In the statute of James they are made to apply to all persons deriving their authority from the commissioners.

PARKE, B.—I am of the same opinion. In *Edge v. Parker*, the Court of King's Bench decided that the creditors' assignee was not within the protection of this clause; that decision was in conformity with a previous one of the Court of Common Pleas, and was afterwards confirmed by the judgment of Lord *Tenterden* in *Worth v. Budd*. There is therefore a great weight of authority that the clause does not apply to the general assignees. And, upon the samereasoning on which those cases proceeded, it certainly does not apply to a provisional assignee under the old law; but only to persons having a special authority under the act of Parliament, not to persons who act by virtue of their property in the articles which are made the subject of the action. The case of a provisional assignee therefore was the same as that of the regular assignees. Then the next question is, whether the case of the official assignee differs from that of the provisional assignee; and I am of opinion that it does not. The act vests the property in the official assignee, as it did in the provisional; he acts by virtue of the authority flowing from his right of property, not of any

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special authority given by the act. The only difference in the cases is, that the Court had power to appoint a single provisional assignee, whereas now they have the power of selecting out of the list of official assignees appointed by the Chancellor. The right he exercises in seizing the goods, is a right belonging to him by virtue of his property in them, and not of any special power given to him either by the 6 Geo. 4, c. 16, or the 1 & 2 Will. 4, c. 56.

ALDERSON, B.—I am of the same opinion. I may observe that there are but few cases in which assignees could have been required to plead specially before the new rules, even without the provisions of the act: they would not in trespass, because the possession would be all that was in dispute; nor in trover; nor in assumpsit.

Rule absolute.

Ex parte WILLIAM KNIGHT, a Bankrupt.

Where a bankrupt, being in the custody of the marshal in execution for debt, on his being brought up before the Subdivision Court of the Commissioners for examination, was by that Court committed, for not answering satisfactorily, to the custody of the keeper of Newgate, and the

keeper of Newgate delivered him to the messenger, who redelivered him to the custody of the marshal, the Court refused to grant a writ of habeas corpus to bring up the bankrupt on the ground that he had satisfactorily answered the questions.

PLATT moved for a habeas corpus, to be directed to the marshal of the Marshalsea, the messenger to the fiat, and the gaoler of Newgate, to bring up the body of the bankrupt. It appeared that the bankrupt had been brought up before a Subdivision Court of the Commissioners of Bankruptcy in Basinghall-street for examination, and not answering certain questions to their satisfaction, was committed by that Court to the gaol of Newgate. At the time he was so committed, he was in the custody of the marshal of the Marshalsea, in execution for debt, and was brought by the messenger to the

flat before the Court of Subdivision from the Marshalsea prison. The warrant of commitment was directed to the keeper of Newgate, who delivered the bankrupt to the messenger, and he delivered him back to the marshal of the Marshalsea; and he was accordingly there detained in prison. *Platt* contended that the answers given to the questions set out in the warrant were sufficient, and ought to have been treated as satisfactory by the Subdivision Court.

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The Court expressed great doubt whether they ought to grant the writ to be directed to the marshal, as upon the bankrupt's being brought up, and its being shewn that he was detained there for other causes, it would be a good answer to his claim to be discharged. The warrant, stating the questions and answers at full length, having been read, the Court said they wished to examine it, and would give their opinion the following day.

On the following morning,

PARKE, B. said—This writ must be refused on two grounds. First, on a careful perusal of the questions and answers, we think the Commissioners were justified in holding the answers not to be satisfactory. Secondly, it does not appear that the bankrupt was detained in custody on this warrant. The Court of Common Pleas refused a writ, under the same circumstances, in a case which came before them a day or two ago.

Writ refused.

—◆—
**REX v. The Sheriff of MIDDLESEX, in a Cause of BARTON
 v. MORGAN.**

IN this case the defendant was arrested on the 19th of September, but the sheriff who arrested him went out
 An attachment may be said to be granted, when the rule for the attachment is obtained, and after that the proceedings are on the crown side of the Court, and affidavits in the matter are properly intitled *Rex v. The Sheriff of* ———.

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of office on the 29th of the same month. On the 5th of October the plaintiff obtained a Baron's order for the sheriff to return the writ, and a rule was subsequently obtained for an attachment against the sheriff for disobedience to that order. The sheriff however had in fact returned *cepi corpus* on the execution of the writ in the month of September. *Humfrey*, on a former day in this term, had obtained a rule to shew cause why the above order and rule should not be set aside for irregularity.

Erle now shewed cause, and objected to the affidavits. —The affidavits are intitled *Rex v. The Sheriff of Middlesex*, which is wrong, as the matter does not come on the crown side of the Court until criminal proceedings have been commenced against the sheriff. Here no attachment has yet been issued. At all events, he has no right to set aside the order.

Humfrey, *contra*.—The affidavits are rightly intitled. The rule for the attachment has been served, and the plaintiff has a right to go on upon that rule against the sheriff. The sheriff cannot tell whether the attachment itself has been issued or not.

PARKE, B.—The rule laid down in *Tidd's Practice* (a) is, that as soon as the attachment is granted, the proceedings are on the crown side. It is reasonable to consider the attachment to have been granted when the rule has been obtained. The sheriff cannot know when the attachment is sued out. The result will be, that the rule will be absolute for setting aside the rule for the attachment and subsequent proceedings, but not the order, the plaintiff undertaking not to proceed on the order.

Rule absolute accordingly.

(a) P. 314, 9th edition.

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Mr. Joshua Watson, for 31*l.* 3*s.*, due yesterday, is dishonoured and unpaid; and I am desired to give you notice thereof, and to request that the same may be immediately taken up.

"I am, Sir, &c.

"H. D. RUSHBURY."

On the same day the following letter was also written and sent to the defendant :

"Sir,—I beg to inform you that a bill of exchange by Joshua Watson for 31*l.* 3*s.*, and due yesterday, is returned dishonoured, and remains unpaid; and I am desired to give you notice thereof, and to request that you pay the same immediately.

"I am, yours, &c.,

"H. D. RUSHBURY."

"15, Fish-street Hill, 10th Aug. 1836."

At the time these letters were written, the bill (indorsed in blank) was in Mr. Rushbury's hands, having been left at his office by the indorsee, to be presented for him.

Cresswell, for the defendant, objected that the notices thus given were insufficient, as they did not state who the holder was, or on whose part Mr. Rushbury applied, or where the bill was lying. The learned Judge reserved the point, and the plaintiff had a verdict.

Cresswell now moved, pursuant to the leave reserved, for a rule nisi to enter a nonsuit.—The notice of dishonour was insufficient. Mr. Rushbury, by whom it was sent, was no party to the bill, and he does not state that he applies in the name of any party to the bill. [*Parke*, B.—The bill being indorsed in blank, Rushbury was the holder. Lord *Abinger*, C. B.—If your objection be good, every notice of the dishonour of a bill lying at a banker's would be bad.] In *Chapman v. Keane* (a), it was held that the

(a) 3 Ad. & Ell. 193; 4 Nev. & M. 607.

holder of a bill is entitled to avail himself of notice of dishonour given by any party to the bill; but here it is given by a party who, though in fact the holder of the bill, could have no title to sue *the defendant*, who is liable only on his guarantee to the plaintiff. [*Parke, B.*—*Prima facie* Rushbury would have a legal right to the bill: I do not mean to say his right might not be qualified by proof that it was not intended that he should exercise it in the particular case. It is the same as if the bill had been sent to a banker.] The banker is more strictly the holder, because he enters the bill to the credit of the customer. [*Bolland, B.*—No, it is entered short.]

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Lord ABINGER, C. B.—I really think there is no ground for the application.

The rest of the Court concurred.

Rule refused.

CARDWELL v. LUCAS.

COVENANT.—The declaration stated, that one John Hodson, before and at the time of the making the indenture thereafter mentioned, was seised in his demesne as of fee of and in the tenements and premises thereafter mentioned to have been demised: and being so seised, theretofore, to wit, on the 25th of March, 1825, by

A declaration in covenant stated that one J. H. was seised in fee, and being so seised, by a certain indenture, with the consent and approval of the

said J. H. then given, made between the said J. H. of the one part, and the defendant of the other part, (profert, sealed with the seal of the defendant,) it was witnessed, that, for the considerations therein mentioned, he, the said J. H., did demise to the defendant, his executors and administrators, certain premises therein mentioned; to hold to him, his executors, &c., for the term of eleven years. By virtue of which said indenture, and by permission of the said J. H., the defendant afterwards entered into the premises, and was possessed thereof. That J. H. afterwards made his will, by which he devised the estate to his widow E. for life, remainder to the plaintiff for life. It then averred the death of J. H., and afterwards of E., his wife, whereupon the said plaintiff became and was seised of the reversion of and in the premises in his demesne as of freehold for the term of his natural life, under and by virtue of the will. The defendant pleaded in effect that, although the deed was his deed, yet, that it was not signed by J. H., nor by any agent of the said J. H. thereunto lawfully authorized by writing, nor was any lease for the said term of eleven years put into writing and signed by J. H., or any agent, &c. —*Held*, on demurrer, that the action was not maintainable by the plaintiff against the defendant for breaches of the covenants in the indenture.

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a certain indenture then, *with the consent and approval of the said John Hodson then given*, made between the said John Hodson of the one part, and the said defendant of the other part, (which said indenture, sealed with the seal of the defendant, the plaintiff now brought here into Court), *it was witnessed*, that for the considerations therein mentioned, he the said John Hodson had demised, granted, leased, set, and to farm let, and by those presents did demise, grant, lease, set, and to farm let, unto the said defendant, his executors and administrators, all that messuage or tenement, &c., [here followed a description of the premises,] to have and to hold the same unto the said defendant, his executors and administrators, as follows; that is to say, as to the meadow lands, which were the closes called &c., from the 25th of December then last past; as to the pasture and arable lands, except the close called &c., which was to be used as an outlet in the last year of the term, from the 2nd of February then last past; and as to the said close called &c., and all the residue of the thereby demised premises, from the 12th of May then next, for and during the term of eleven years from those respective days next ensuing, and fully to be complete and ended, yielding and paying therefor as therein mentioned. And the said defendant did for himself, his heirs, executors and administrators, covenant, promise, and agree, to and with the said John Hodson, his heirs and assigns, by those presents, amongst other things, that he the said defendant, his executors and administrators, should and would, with his and their cattle, eat and consume upon the thereby demised premises, all the hay, fodder, and straw, wheat straw excepted, which should from time to time during the said term arise therefrom, and should and would yearly and every year, and at the most proper and seasonable time or times in each year during the said term thereby granted, set, spread, and bestow in an husbandlike manner upon such part or

parts of the before-mentioned meadow lands as should be most in need thereof, all the dung, compost, and manure which should thereafter arise or be made from such eating and consumption as aforesaid, or be otherwise made upon the said thereby demised premises, save and except the dung and manure which should arise or be made from such eating and consumption as aforesaid in the last year of the said thereby granted term, which last-mentioned dung and manure should be left in the usual or common middingstead belonging to the said premises for the use and as the property of the said J. Hodson, his heirs and assigns; and also save and except so much of the said dung and manure as should be sufficient for planting yearly any quantity of potatoes not exceeding one-fourth part of an acre; and further, that after the hedges, ditches, gates, stiles, plats, and fences of and belonging to the thereby demised premises; should have been put into good and tenantable repair and condition by and at the expense, of the said J. Hodson, his heirs or assigns, he the said defendant, his executors and administrators, should and would from time to time and at all times afterwards during the then residue of the said term thereby granted, at his and their own expense, keep and continue the same in the like repair and condition, and so yield up the same at the term's end: as by the said indenture, reference being thereunto had, would more fully appear. By virtue of which said indenture, and *by the permission and consent of the said J. Hodson*, the said defendant afterwards, to wit, on the 25th of March, 1825, entered into and upon all and singular the said premises so mentioned to have been demised, with the appurtenances, and became and was possessed thereof for the said term therein mentioned; and the said J. Hodson being so seised as aforesaid, he the said J. Hodson afterwards, to wit, on the 8th of February, A.D. 1828, duly made and published his last

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a Court of Chancery. The plaintiff then stated a devise to trust the said premises for 1000 years, on certain trusts, and sub- John Lucas, the said plaintiff's widow, Ellen, for life, or until the death of the said plaintiff, (the remainder to the plaintiff for life.) and the said plaintiff afterwards, to wit, on the 8th of February, 1829, was so seized of the reversion of and in the said premises, with the appurtenances as aforesaid, and the said plaintiff by his said will as to his said devise of the said premises with the appurtenances, whereupon and whereby the said Ellen then became and was seized in the said premises of freehold for the term of her natural life, and the reversion of and in the said premises, with the appurtenances, subject to the said term of 1000 years, and the said term thereof after the death or second marriage of the said Ellen belonging to the plaintiff, in manner as was devised and declared by the said will devised and declared: and the said Ellen being so seized, the said term of and in the said premises with the appurtenances, afterwards, to wit, on the 1st of February, 1829, under and by virtue of and in pursuance of the said last will and testament, and the provisions thereof, ceased, determined, and became and was utterly void to all intents and purposes whatsoever, the said premises or any part thereof not having been sold, mortgaged, or disposed of for the purposes aforesaid, or otherwise. And the said Ellen afterwards, to wit, on the day and year last aforesaid, died so seized without having intermarried a second time: whereupon and whereby the said plaintiff then became and was seized of the said reversion of and in the said premises with the appurtenances, in his demesne as of freehold, for the term of his natural life, under and by virtue of the said last will and testament. The declaration then averred several breaches of the covenants therein set forth, viz., for not consuming the hay upon the premises for not spreading the manure on such of the land as most wanted it, and that

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of the said demise, and delivering up possession as aforesaid, to hold the same premises according to the terms of the said indenture, and held and enjoyed the same accordingly as such tenant as aforesaid, for and during the whole of the said term mentioned in the said indenture continually, until the determination thereof. Concluding with a verification.

Demurrer, assigning the following causes.—First, there being no signed lease, the estate created by the demise mentioned in the replication was only an estate at will, which determined on the lessor's death. Second, that the plaintiff ought to have stated in the replication the estate which he means to say the defendant took by the said demise. Third, that the plaintiff ought to have stated how the demise was made. Fourth, that if the plaintiff means by his replication to say, that the estate for years witnessed by the indenture to have been created was so created, he ought to have denied the truth of the plea, by alleging that there was some lease properly signed, or to that effect. Fifth, that the replication is a departure from the declaration. Sixth, that if the replication is intended to raise an estoppel, the plaintiff ought to have so pleaded, and relied on the estoppel. But, lastly, that there is nothing in the record to estop the plaintiff from relying on the Statute of Frauds.

Joinder in demurrer.

Cresswell, in support of the demurrer.—The plaintiff does not deny the defendant's allegation that Hodson did not execute the lease: there was, therefore, no demise for eleven years; and, if no such term was executed, there could be no reversion in the plaintiff. By the third section of the Statute of Frauds, there cannot be any lease for a term of years, except it be by deed or note in writing, signed by the party granting it, or by his agent

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Cowling, contra.—The plea is bad, and the declaration good. It is clear, that the mere non-execution of an indenture by a party will not preclude him from maintaining an action upon it, *Clement v. Henley* (a); and the converse has been recently decided, that whoever may sue as party to an indenture must sue, *Petrie v. Bury* (b). But not only may a party sue who has not executed, but *Gilbert*, C. B., Bac. Abr. Leases (O), after considering the authorities, holds that a lessee is equally estopped by an indenture executed by himself, although unexecuted by the lessor, if there be no incapacity in either of the parties. And *Hullock*, B., in *Paul v. Meek* (c), says, "It seems to me, therefore, that this counterpart was admissible as original evidence, and precluded the defendant from going into proof of the original lease." So, in the ordinary case of a bond, the obligor is estopped, though the obligee never executes. Now, here it is not stated as a fact that Mr. Hodson demised, as was the case in *Wilson v. Woolfryes*, and which was decided on the ground of variance only, but with a testatum existit that he demised, and so the estoppel relied upon. In *Webb v. Russell*, no question of this kind arose; there was in that case an actual reversion, which merged in the ultimate reversion in fee. [Lord Abinger, C. B.—The difficulty is as to the reversion in the plaintiff.] If the defendant is estopped as against Mr. Hodson, he is equally estopped as regards the plaintiff, who has the same estate that Mr. Hodson had. Estoppels extend to privies in estate. *Palmer v. Elkins* (d). [Parke, B.—That case decided that nil habuit in tenementis is not a good plea either against the lessor or his assignee.] If, then, the lessee is equally estopped, whether the lessor executed or not, it may be admitted that the plea would have been good if it had shewn that the con-

(a) 2 Roll's Abr. 22, pl. 2.

(c) 2 Y. & J. 120.

(b) 3 B. & C. 353; 5 D. & R.

(d) 2 Ld. Raym. 1550.

consideration of the covenant failed; either because the transaction was imperfect and the lessee never entered, in consequence of the non-execution, or because, after entry, he was subsequently evicted. The cases go on the want of consideration; Com. Dig. Covenant (F). *Rose v. Poulton* (a). There the declaration stated, that, by an indenture between A. and B. (the plaintiffs) and his, B.'s, wife, and one C. (who was then dead) of the one part, and D. and E. and the same C. of the other part, after certain recitals it was witnessed that, in consideration of the covenants thereafter entered into by A., B., and his wife, and C., and of 10s. paid the said D., E. and C. covenanted with A. and B., and his wife and C., to pay the annuity. It appeared on the pleadings, that A. and B. did not execute the deed; but the Court held that they could sue for the annuity, on the ground that the consideration had not wholly failed. There, indeed, Lord Tenterden appears to have admitted (b) that a lessor could not sue on an indenture of demise if he had not executed it; but the other learned Judges do not confirm that, and *Patteson, J.*, (c) says, that the cases cited did not apply, "for they are all cases in which a lease was in contemplation, and where, in consequence of the non-execution, the relation of landlord and tenant never was created." Here that relation has been created. [Lord Abinger, C. B.—As you put it, the tenant would be liable to all the covenants, although he could have no action against the lessor.] There might be a difficulty as to the tenant's species of remedy against the lessor; but here it appears, from the declaration, that the tenant has enjoyed in the same manner as if the landlord had executed, and for the whole term. After such an enjoyment it may also be contended, independently of the estoppel, that the difficulty suggested by the defendant, as to the want of a demise or

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(a) 2 B. & Ad. 822.

(b) P. 828.

(c) Ib. 831.

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reversion, does not arise; since, in one sense, the defendant has enjoyed under a demise for the whole term. "A parol lease was made de anno in annum quamdiu ambabus partibus placuerit; it was adjudged that this was but a lease for a year certain, and that every year after it was a springing interest arising upon the first contract and parcel of it; so that if the lessee had occupied eight or ten years, or more, these years, by computation from the time past, made an entire lease for so many years; and, if rent was in arrear for part of one of those years and part of another, the lessor might distrain and avow as for so much rent arrear upon one entire lease, and need not avow as for several rents due upon several leases, accounting each year a new lease. And this seems no way impeached by the Statute of Frauds and Perjuries, which enacts, 'That no parol lease for above three years shall be accounted to have any other force or effect than of a lease only at will; but with this the statute has nothing to do, but only looks forward to parol leases for above three years to come.'" *Bac. Abr. Leases (L)*, p. 839. [Lord Abinger, C. B.—You say that what is said by Comyns, *Covenant F.*, shews that the objection does not apply where there has been an enjoyment for the whole term. *Parke, B.*—You say it applies only where there has been nothing done in consequence of the non-execution of the deed.] Yes, and the last authority shews that the objection raised from the Statute of Frauds is not tenable. In *Soprani v. Skurro (a)*, cited by Comyns, the breach laid in the declaration was, that, "after the sealing and delivery of the said indenture by the said Welsh, and of the said bond by the plaintiffs, durante prædicto termino 7 annorum per indent. præd. dimiss., the wall fell for want of repairs;" and it did not appear that the lessor had ex-

(a) *Yelv.* 18.

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a plea of nil habuit in tenementis is a bad plea either against the lessor or his assignee. The question here must be tried, not by what has taken place after, but what were the circumstances at the time the lessee first took possession. He had a mere tenancy at will, which would be determined by Mr. Hodson's death, and it was to that reversion that the covenants were annexed. Then the covenants cannot be disannexed and annexed to a new reversion. The question in *Legg v. Hackett* was merely one of pleading. [Lord Abinger, C. B.—When a man has held for seven years under a tenancy from year to year, you may allege it to have been for a term of seven years. *Parke, B.*—It was not merely a point of pleading, though the decision may have been come to in order to enable the landlord to distrain for the arrears of former years; since previously to the stat. 8 Anne, c. 14, a landlord could not distrain except during the tenancy, and even afterwards only during the following six months.] Still the lessor could not say that he had a reversion expectant on the determination of a term of seven years. If a person who executes a deed is estopped as regards the reversioner, the question still remains, is the plaintiff that reversioner? It is impossible here to say that the plaintiff had a reversion expectant on a term of eleven years. [Lord Abinger, C. B.—The case has been very well argued on both sides. The Court will take time to consider.]

Cur. adv. vult.

The judgment of the Court was now delivered by—

LORD ABINGER, C. B.—(After stating the pleadings, his Lordship proceeded.) This action being brought by the plaintiff, as assignee of the reversion, it is quite clear that it cannot be maintained unless he be assignee of *the* reversion to which the covenants in the instrument declared

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HOBBY and Another v. PRITCHARD.

Where a Judge's order had been obtained on the application of one of two plaintiffs to have the bill of the plaintiffs' attorney taxed on his undertaking alone, the Court set aside the order, it having been obtained on the ordinary affidavit.

Quære, whether such an order might have been supported, had it been obtained on a special application, so as to give the parties an opportunity of answering the facts alleged.

IN this case *Chandless* had obtained a rule to shew cause why an order which had been obtained by the plaintiff, William Hobby, to refer the bill of the plaintiffs' attorney to be taxed by the Master, on his undertaking alone. He cited *Finchett v. How* (a).

Addison now shewed cause.—The objection is, that by the stat. 2 Geo. 2, c. 23, there ought to be the undertaking of both parties. But it is submitted that this Court or a Judge has jurisdiction to grant the order on the application and understanding of one of two parties, where there is a joint retainer. The 23rd section provides, that no attorney, &c., shall commence any action for the recovery of any fees, &c., until the expiration of one month after such attorney shall have delivered to the "party or parties" to be charged therewith, &c., a bill of such fees, &c. &c. It is to be observed that the words there are "party or parties" only. It then proceeds, that upon application of the party or parties chargeable by such bill, "or of any other person in that behalf authorized," unto the Lord High Chancellor, or unto a Judge or Baron of any of the Courts in which the business shall have been transacted, and upon the submission of the said party or parties, or such other person authorized as aforesaid, to pay the whole sum, that upon taxation of the said bill should appear to be due to the said attorney or solicitor respectively, it shall be lawful for any Judge, &c., to refer such bill to be taxed by the proper officer; and upon the taxation of such bill, "the party or parties," not "the person authorized," shall forthwith pay to the said attorney or solicitor respectively, &c., the whole sum that shall be

(a) 2 Camp. 277.

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in any other matter than this. But, independently of the statute, it has been held that the Courts had in their discretion, at common law, authority to order bills to be taxed. Undoubtedly that is a proposition not entirely settled. In *Watson v. Postan* (a), this Court decided that it had such jurisdiction at common law, and that a Baron at chambers might, in his discretion, on the application of a defendant, order the bill to be taxed, without such defendant giving the undertaking to pay the amount. So, in a case before that, *Wilson v. Gutteridge* (b), the Court of King's Bench held that they had a paramount jurisdiction, independently of the statute, to refer an attorney's bill for taxation. In *Dagley v. Kentish* (c), undoubtedly the Court expressed a doubt, but they gave no judgment on the point; and the decision of this Court in *Watson v. Postan* occurred since that case. Certainly there was in *Watson v. Postan* an action pending to recover the amount of the bill: but Lord *Lyndhurst* there says, "This order was not made in pursuance of the Act of Parliament, but under the jurisdiction which the Court has at common law, and the Court may mould its orders as it thinks proper." [*Parke, B.*—The case of an action pending is not within the statute.]

Chandless, contra, was stopped by the Court.

LORD ABINGER, C. B.—If you had made a special application on these facts, the other party would have had an opportunity of answering them. But your application has been made on the ordinary grounds.

ALDERSON, B.—The Court would scarcely give the

(a) 2 C. & J. 370.

(b) 3 B. & Cr. 158.

(c) 2 B. & Ad. 411. See *Clut-*

terbuck v. Coombs, 5 B. & Ad.

400; *Howard v. Groom*, 4 Dowl.

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attorney less security for the payment of his costs than the statute requires.

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PARKE, B.—This rule must be made absolute.

Rule absolute.

WHITE and Another v. IRVING.

IN this case *Petersdorff* applied for the defendant's discharge out of custody, on the ground of a defect in the affidavit to hold to bail. The affidavit was not entitled in any court, and was sworn in Scotland before a commissioner who stated himself to be so, by virtue of a commission to take affidavits from the Courts of Common Pleas and Exchequer. [*Parke, B.*—Is not that sufficient?] It does not appear in what court the affidavit is intended to be used, and it would be doubtful whether an indictment for perjury could be sustained.

An affidavit to hold to bail, not intitled in any court, but sworn in Scotland before a commissioner, who states himself to be a commissioner by virtue of a commission from the Courts of Common Pleas and Exchequer, is sufficient.

LORD ABINGER, C. B.—It would be quite sufficient to allege that the party made the affidavit, intending to use it for the purpose of instituting proceedings against the defendant.

Motion refused (a).

(a) See *Perse v. Browning*, 1 M. & W. 362.

COX v. SALMON.

SHEE moved for an attachment for non-payment of costs pursuant to the Master's allocatur: the only question was, whether the costs had been properly demanded.

The demand of costs on the Master's allocatur by the attorney in the cause, they

being costs in the cause, is sufficient whereon to ground an attachment.

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The attorney in the cause had demanded them, but the Master had not directed that they should be paid to him. The officer had some doubt whether this was a sufficient demand. [*Parke, B.*—Are they costs in the cause?] Yes. [*Parke, B.*—Then they are to be paid to the attorney in the cause. It is quite sufficient.]

Per Curiam.—

Rule granted.

TRIBE v. WINGFIELD.

The Court held that an under-sheriff was justified in laying down a rule, that no person but a barrister, or an attorney, should appear as the advocate of a party on a writ of trial.

THIS was a case tried before the under-sheriff of Warwickshire, on a writ of trial; and the plaintiff having recovered a verdict,

Erle moved for a new trial, on the ground that a person of the name of Edmunds, who appeared before the under-sheriff as the advocate of the defendant, was not allowed to be heard; the under-sheriff having laid down a rule that he would hear no one but a barrister or an attorney. The defendant declined to conduct his case in person, and the plaintiff had a verdict as in an undefended cause.

LORD ABINGER, C. B.—I think the under-sheriff was quite right. As long as I have the opportunity of saying so, I will never lend my authority to support the position, that a person who is neither a barrister nor an attorney may go and play the part of both.

ALDERSON, B.—There is in such a case none of that control which is so useful where counsel or attorneys are employed.

It being suggested, however, that the same person had

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Corner and Henry Bond, yeomen, all those my freehold lands, tenements, and hereditaments, which I hold in fee-simple, situate, lying, and being in the parish of Burlescombe, and county of Devon, called or known by the names of Harris's and Moor's Croft, upon this special trust and confidence in them reposed, and to the intent or purpose that they, the said Richard Corner and Henry Bond, and the survivors and survivor of them, do and shall permit and suffer my wife, Mary Spark, to have, hold, and enjoy the same, and to take to her own use and behoof the rents, issues, and profits thereof during her natural life; and after her decease, upon this further trust and confidence, and to the intent and purpose that the said trustees, or survivors or survivor of them, do and shall, out of the rents, issues, and profits arising out of my said freehold lands and tenements, pay or cause to be paid unto my brother David Spark the yearly sum or annuity of ten pounds for the term of five years, if he should so long live; as also my wearing apparel of every sort. Also I give and bequeath unto John Gord the dwelling-house, called the Middle House, and part of the orchard, together with the garden thereto belonging, to hold to him during his natural life, and after his decease to his wife, Mary Gord, and after their decease to John Gord, the son of George Gord, and his assigns. Also I give and bequeath unto John Gord and Jane Needs the aforesaid close of land, called Moor's Croft, to hold to them during their natural lives as tenants in common, and not as joint tenants; and after their decease to *George Gord, the son of George Gord*, and to his heirs. Also I give and bequeath unto Jane Needs the dwelling-house wherein I now reside, together with the pound-house, garden, and other appurtenances thereunto belonging, to hold to her during her natural life; and after her decease to her daughter Ann Needs, and her assigns. Also I give and bequeath unto Ann Needs, until the decease of George

Needs and Jane Needs, the lower house and garden; and after their decease to *George Gord, the son of Gord*, and his assigns. Also I give and bequeath unto *George Gord, the son of John Gord*, the sum of ten pounds, and to Jane and Elizabeth, the two daughters of the said John Gord, the sum of five pounds each. Also I give and bequeath unto Mary Gord, the daughter of George Gord, the sum of five pounds, and to *George Gord, the son of the said George Gord*, the sum of ten pounds, and to John Gord, one other son of the said George Gord, the sum of twenty pounds. Also I give and bequeath unto George Needs, the son of George Needs, the sum of ten pounds. All which said legacies to each of them given I order, will, and direct, shall be paid them respectively by my trustees, or survivors or survivor of them, when they come to the age of twenty-one years; and if either of the children of John Gord, George Gord, or George Needs, happen to die before the legacies herein and hereby to them given, the share of he, she, or they so dying shall remain in the surviving brothers and sisters, share and part alike. And it is my will and meaning that my said trustees, or either of them, shall not be liable to answer or make good any loss or losses that shall or may happen in consequence of this my will. And, lastly, I do hereby nominate, constitute, and appoint my said wife, Mary Spark, to be sole executrix of this my last will and testament."

The testator died in January, 1812, without having revoked or altered his will. Mary Spark, his widow, died in 1819. The devisees Jane Needs, Ann Needs, and George Needs had also died before the commencement of this action. The lessor of the plaintiff, who was the George Gord, the son of George Gord, mentioned in the will, claimed the premises in question under the devise to "George Gord, the son of Gord," and offered evidence of declarations by the testator, shewing that he, the lessor of the plaintiff, was the intended devisee in remainder of the

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"lower house and garden." It was contended for the defendant that this evidence was not admissible, but the learned Judge overruled the objection. It was also objected that the plaintiff could not recover, for that by the will the legal estate was vested in the trustees. The learned Judge reserved this point; and a verdict having been found for the plaintiff,

Ball, in Easter term, moved pursuant to the leave reserved, and obtained a rule nisi for a nonsuit or new trial on these two points: citing, as to the first, 2 Stark. Evid. 925; and, as to the latter, 2 Saund. 11 a, n. 17; and *White v. Parker* (a).—In Trinity term, cause was shewn by

Bompas, Serjt., and *Moody*.—First, the estate is vested in the devisee, unless the trustees took the legal fee. It is submitted that they did not. In the first place, there are no words of inheritance in the devise to the trustees; but in other parts of the will, where legal estates are intended to be given, words of inheritance are repeatedly made use of. The testator, therefore, knew what words were proper to create a limitation in fee. In *Doe d. White v. Simpson* (b), lands, arrears of rent, &c. were devised to trustees and the survivor of them, and the executors and administrators of such survivor, in trust out of the rent and profits, and the arrears, &c., to pay certain annuities for lives, and a sum in gross for legacies; and from and after payment of such annuities and money, the testator devised successive estates for lives, with a remainder in tail; he gave the trustees also a general power of leasing for the best rent, with a yearly allowance to each for their trouble: and it was held, that after the death of the annuitants and the raising of the money for legacies, the legal estate vested

(a) 1 Bing. N. C. 573.

(b) 5 East, 162.

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[*Parke, B.*—I apprehend it will make no difference in the construction of this will, whether the legacies were to be paid absolutely out of the real estate, or on failure of the personal; the trustees must equally have the legal estate for the purpose. No other means of paying them appears, except out of the rents of the real estate.] The trustees could not intervene during the wife's life; yet they are to pay the legatees on their respectively attaining twenty-one; therefore they must have the means of paying out of some fund in their hands, at a period when they had no control over the real estate. The legacies are not charged in terms either on the real or personal estate; although the testator has appointed an executrix. There are no words which carry an express trust of the real estate for any further purpose than to permit the wife to enjoy, and to pay the annuity. For the purpose of the trustees paying the legacies, there must be *implied* either a further devise to them of the real estate, or a bequest to them of the personal. And the personalty being the primary fund for that purpose, the latter implication ought rather to be made.

Secondly, the ambiguity occasioned by the omission of the Christian name in this devise, was one which parol evidence was properly admitted to explain. The distinction always referred to on this subject is between *patent* and *latent* ambiguities; and it is commonly said the ambiguity is *patent*, where you can see on the face of the instrument that there is an ambiguity, and *latent* where you cannot. But it is conceived that this is not an accurate statement of the principle, and that the true distinction is this;—that a patent ambiguity is one which arises on the inquiry to discover the meaning of the testator from the words he has used, abstractedly from all external facts or persons: but that where it is impossible to ascertain the meaning without a reference to extrinsic

things, that is a latent ambiguity, which you must have recourse to evidence *aliunde* to explain. Suppose a devise to Mr. Smith—that is a patent ambiguity in one sense, for every one who reads it sees that it is ambiguous; yet parol evidence would clearly be admissible to explain it. *Cheyney's case* (a), *Abbott v. Massie* (b), *Beaumont v. Fell* (c). But why is such a devise ambiguous? Because we know *extrinsically* that there are a multitude of Mr. Smiths: to which of them the bequest applies can be known only by extrinsic evidence. In like manner, how otherwise do we know that there is not a George, the son of Gord? There is therefore of necessity *some* extrinsic evidence admitted, to shew that this is not a true description. We cannot have any apprehension of the *existence* of an ambiguity, without some reference to external circumstances—without an assumption in our own minds of some extrinsic evidence. If there were a person of the name of Gord, having no Christian name, this is a correct description. The cases in which evidence of this kind has been refused, were where it was tendered to prove the *intention* of the testator—his own construction of the meaning of his will—not what were the persons or things referred to by it. Where a blank was left for the Christian name, evidence was received to shew the testator's intentions with regard to the person answering to the surname; *Price v. Page* (d). So, where two initials of the party only were given; *Abbott v. Massie*. [*Alderson*, B., referred to *Doe d. Morgan v. Morgan* (e).] In *Millar v. Travers* (f), *Tindal*, C. J., enters fully into the consideration of this subject, and states the distinction deducible from the authorities to be this:—"That an uncertainty, which arises from applying the description contained in the will

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(a) 5 Rep. 68.

(b) 4 Ves. 148.

(c) 2 P. Wms. 141.

(d) 4 Ves. 680.

(e) 1 C. & M. 235.

(f) 8 Bing. 251.

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either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself." . . . "In the former case the evidence is produced to prove facts, which, according to the language of Lord Coke, in 8 Rep. 155, '*stand well with the words of the will.*'" This is a case falling within the first branch of this classification. On the face of the will, the testator has clearly disposed of this particular estate to a particular person: but the uncertainty arises from applying the disposition to the person of the devisee. It does not *of necessity* appear on the face of the will, even that the description applies to either of the George Gords mentioned in the will. It may or may not turn out, from the parol evidence, that he means one of them. The principles applying to this subject are admirably laid down by Mr. Wigram, in his work on the admission of extrinsic evidence in the interpretation of wills (a). The following are additional authorities in support of the distinction contended for by the plaintiff: *Hodgson v. Fitch* (b); *Richardson v. Watson* (c); *Masters v. Masters* (d); *Smith v. Coney* (e); *Careless v. Careless* (f).

Ball, in support of the rule.—The lessor of the plaintiff is not entitled to recover, if *any* estate, whether a chattel interest or not, still remains in the trustees. [*Parke*, B.—If the only point made on the trial was that they took an estate in fee, I think you are too late now to raise the objection; because, if it had been then contended that they took a chattel interest, the lessor of the plaintiff might

(a) P. 78.

(b) 2 Vern. 593.

(c) 4 B. & Ad. 787.

(d) 1 P. Wms. 421.

(e) 6 Ves. 42.

(f) 1 Meriv. 384.

have supplied the defect by shewing that the legacies were discharged.] *Erech. of Pleas,*
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The evidence of the testator's declarations was not admissible. Mr. *Starkie* thus states the rule:—"Ambiguities which arise on the face of the will cannot be removed by the aid of extrinsic evidence; they may be helped by construction, but never by averment." In *Doe d. Preedy v. Holton* (a), the testator devised to A. the messuage and tenement in S. wherein he resided, with the outhouses, &c. *to the same adjoining*, and all those closes called &c., part of the farm and lands *in his own occupation*; and he devised to B. all his hereditaments in S. not before devised: and evidence of declarations by the testator that he meant that certain cottages *adjoining* to his residence, and not in his own occupation, should go to B., was held inadmissible: and *Patteson, J.*, says—"In every case extrinsic evidence must be received for the purpose of shewing the state of the property, so as to see what comes within the clear terms of the devise; but not to clear up any difficulty arising upon the will itself." Here there is, on the face of the will itself, the greatest difficulty to be cleared up. The two George Gordes, the sons of George and John, are both express objects of the testator's bounty. Looking, therefore, at the other parts of the will, it is impossible to say with certainty which is the object of the devise in question. This is in effect defeating the object of the Statute of Frauds, and making a devise of lands by parol. It is not like the case of a devise to two persons of the same name, either of whom will fit the terms of the devise. In *Price v. Page*, there was no express decision; the case, however, is distinguishable. [*Alderson, B.*—The principle is very forcibly laid down by *Gibbs, C. J.*, in *Doe v. Chichester* (b); he seems to take it as a question arising on the construction of the

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(a) 5 Nev & M. 391.

(b) 4 Dow, Parl. C. 65.

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whole instrument.] In *Castledon v. Turner* (a), it was held, that where there is an absolute omission, it cannot be supplied by parol evidence. *Baylis v. The Attorney General* (b) is an authority to the same effect.

PARKE, B.—As to the first point, if it appears that it was taken at the trial, we shall consider whether on that ground the rule ought to be made absolute. If not, the rule must be discharged on that point; because there is no ground for saying that the trustees took a fee, but only a chattel interest for some indefinite term, sufficient to enable them to satisfy the legacies. There can be no doubt that it was unnecessary for them to take the fee: it is different from the cases of a direction for the payment of taxes, repairs, &c.; for those purposes it is necessary for the trustees to take the fee without limitation. And it is equally clear that it was necessary here for them to take a chattel interest, either till the legacies were paid, or till the legatees attained twenty-one; which of the two it is unnecessary to determine, if the point was not taken. We will inquire whether it was or not.

On the other point,

Cur. adv. vult.

In the present term the judgment of the Court was delivered by—

PARKE, B.—In this case, which was heard before my Brothers *Bolland, Alderson, Gurney*, and myself, a rule nisi for a new trial was obtained on two grounds:—first, that upon the true construction of the will of John Spark, under which the lessor of the plaintiff claims, the legal estate in the land in question was not in the plaintiffs, but in the trustees; and secondly, that evidence of the

(a) 3 Atk. 257.

v. *Hort*, 3 Bro. C. C. 311; *Pym v.*

(b) 2 Atk. 239. See also *Hunt Blackburn*, 3 Ves. 457.

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devisor has clearly selected a particular individual as the devisee.

Let us then consider, what would have been the case, if there had been no mention in the will of any *other* George Gord the son of a Gord: on that supposition there is no doubt, upon the authorities, but that evidence of the devisor's intention, as proved by his declarations, would have been admissible. Upon the proof of extrinsic facts, which is always allowed in order to enable the Court to place itself in the situation of the devisor; and to construe his will, it would have appeared that there were at the date of the will *two* persons, to each of whom the description would be equally applicable. This clearly resembles the case put by Lord Bacon of a *latent* ambiguity, as where one grants his manor of S. to J. F. and his heirs, and the truth is that he has the manors both of North S. and South S.; in which case Lord Bacon says, "it shall be holpen by averment, whether of them was that which the party intended to pass." The case is also exactly like that mentioned by Lord Coke in *Altham's case* (a); "if A. levies a fine to William his son, and A. has two sons named William, the averment that *it was his intent* to levy the fine to the younger is good, and *stands well with the words of the fine.*" Another case is put in *Counden v. Clarke* (b), which is in point; "if one devise to his son John, where he has two sons of that name:" and the same rule was acted upon in the recent case of *Doe v. Morgan* (c). The characteristic of all these cases is, that the words of the will *do* describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of *varying* the instrument in any way whatever: it only enables the Court to reject one of the subjects, or objects, to which the description in the will applies; and to determine which of

(a) 8 Rep. 155 a.

(b) Hob. 32.

(c) 1 C. & M. 235.

the two the devisor understood to be signified by the description which he used in the will. This subject has been most ably discussed by Mr. Wigram, in his excellent treatise on the rules of law respecting the admission of extrinsic evidence in the interpretation of wills.

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There would then have been no doubt whatever of the admissibility of evidence of the devisor's intention, if the devise to "George, the son of Gord," had stood alone, and no mention had been made in the will of George the son of *John* Gord, and George the son of *George* Gord. But does the circumstance that there are two persons named in the will, each answering the description of "George, the son of Gord," prevent the application of this rule? We are of opinion that it does not. In truth, the mention of persons by those descriptions in other parts of the will, has no more effect, for this purpose, than proof by extrinsic evidence of the existence of such persons, and that they were known to the devisor, would have had: it shews that there were two persons, to either of whom the description in question would be applicable, and that such two persons were both known: and the present case really amounts to no more than this, that the person to whom the imperfect description appears on the parol evidence to apply, is described in other parts of the same will by a more full and perfect description, which excludes any other object than himself. Still he is pointed out in the devise itself by a description, which, so far as it goes, is perfectly correct. In the case of *Doe v. Morgan*, above referred to, precisely the same circumstance occurred.

We are therefore of opinion that the lessor of the plaintiff is entitled to recover; and the rule must be discharged.

Rule discharged.

CHARRINGTON v. MEATHERINGHAM and Another.

A parish officer sued in trespass for distraining for poor rates, is not entitled, under the 43 Eliz. c. 6, s. 19, or 13 & 14 Car. 2, c. 12, s. 20, to treble costs, when the plaintiff is nonsuited.

THIS was an action of trespass against the defendants, who were parish officers, for taking several distresses on the plaintiff's goods for poor and highway rates. The cause was tried at the last Spring assizes for Northamptonshire, when the plaintiff was nonsuited for want of proving notice of action. The Master, on taxation, allowed the defendants treble costs. *Miller* having obtained a rule nisi for a review of the taxation,

N. Clarke shewed cause.—The question, whether the Master has done right in taxing the defendant's treble costs, depends, first, on the poor law acts of 43 Eliz. c. 2, s. 19, and 13 & 14 Car. 2, c. 12, s. 20; and secondly, on the highway act, 13 Geo. 3, c. 78, s. 81. The two former statutes give treble damages to parish officers, sued in trespass, for acts done in pursuance of their authority, if the plaintiff be nonsuited; and treble damages necessarily include treble *costs*, the costs being the damages which the defendant sustains by being sued. And the 13 Geo. 3, c. 78, s. 81, expressly gives the defendant in any action for any thing done in pursuance of the act, in case of nonsuit, treble *costs*.

Miller, *contra*.—It was expressly decided in *Butterton v. Fuller* (a), that an avowant in replevin on a distress for poor rates was entitled, under the 43 Eliz. c. 2, s. 19, to single costs only; and the distinction was taken, that where the party was entitled to damages at common law, if treble damages are given by statute, he shall have treble costs also; but not where, as in this case, he was not entitled to damages at common law (b). The statute of

(a) 1 Brod. & B. 517. (b) *Okely v. Salter*, Noy's Rep. 137.

Car. 2 has no relation to the present case. And the 13 Geo. 3, c. 78, has been repealed by the 5 & 6 Will. 4, c. 50 (a), which contains no provision for treble costs.

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LORD ABINGER, C. B.—The statute of Elizabeth gives the party treble damages *and* his costs. The case referred to is decisive that that entitles him to single costs only.

PARKE, B.—The 13 Geo. 3, c. 78, is, it seems, out of the question. No general power to make a poor rate is given by the 13 & 14 Car. 2, c. 12; and the provision in that act would operate only in favour of constables, tithingmen, &c. The defendants can claim, therefore, only under the statute of *Elizabeth*, as to which there is an authority directly against them.

Rule absolute.

(a) That act came into operation on the 20th March, 1836. After the determination of this case, it was discovered that the cause was tried before the act took effect; and *N. Clarke*, in Hilary Term, 1837, obtained a rule nisi in the same terms as the

former, in order to raise the question whether, the repeal having taken place after the verdict, but before judgment was signed in the cause, it affected the defendant's right to treble costs under the former statute. See *post*.

SHILLIBEER v. GLYN, Bart., and Others.

ASSUMPSIT.—The declaration stated that the defendants were co-partners in banking, and exercised the trade of bankers in London; that the plaintiff was the owner of coaches, &c., running in and about London and other places, and in the habit of attending markets and fairs for the sale of horses; that on the 31st of March, 1834, the plaintiff being about to proceed from London to a

Semble, that a declaration in assumpsit stating that the plaintiff being about to proceed to N., paid money to the defendants in London, that they might cause it to be paid to him at

N. on a certain day; that the defendants received the money for that purpose from the plaintiff; and that thereupon afterwards, in consideration of the premises, the defendants promised to cause the money to be paid to the plaintiff at N., discloses a sufficient consideration for the promise.

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fair at Northampton, to be held on the 5th of April, paid into the defendants' banking-house in London 650*l.*, in order that the defendants might cause that sum to be paid to the plaintiff or his order at Northampton (a) on the 5th of April; that the defendants received the said sum from the plaintiff for the purpose that they might cause the said sum to be paid to the plaintiff or his order at Northampton; and thereupon, in consideration of the premises, the defendants promised the plaintiff that they would punctually cause the said sum to be paid to the plaintiff or his order at Northampton on the 5th April.

Breach—that although the plaintiff, confiding &c., did go to the fair at Northampton, for the purpose of purchasing horses, the defendants did not, though requested (b), pay or cause to be paid the said money or any part thereof to the plaintiff or his order at Northampton, at the time so agreed upon: stating special damage in inability to buy horses, and expense in travelling and servants, and being obliged to buy inferior horses at higher prices.

General demurrer; stating as the ground in the margin, that the declaration shewed no sufficient consideration for the alleged promise.

Manning in support of the demurrer.—The declaration shews that the defendants were gratuitous bailees; and such a bailment raises, not the general promise here declared upon, but merely an undertaking to be answerable for gross negligence. *Doorman v. Jenkins* (c) was the case of a gratuitous bailment, but there it was alleged in the second count that the defendant undertook that he

(a) Quære, whether it should not have been alleged that the defendants undertook that their correspondent at Northampton should pay, that being the real understanding of the parties.

(b) Upon special demurrer, it

might perhaps have been objected that the plaintiff should have alleged that the defendants had notice whether the money was to be paid to him or his order.

(c) 2 Adol. & Ell. 256; 4 Nev. & Man. 170.

would take due and proper care of the money delivered to him, whilst in his hands. This must be understood to imply that degree of care which the terms of the bailment required. The count alleged a loss of the money for want of proper care, and a verdict for the plaintiff was held to be properly found under the facts of that case, on the ground of *gross* negligence. But that circumstance would have been immaterial if the gratuitous bailment rendered the bailee liable absolutely, to deliver over in the manner prescribed by the bailor at the time of the delivery. *Coggs v. Bernard*(a). In *Shiells v. Blackburne* (b), a general merchant undertook without reward to enter the goods of A. at the Custom House for exportation, with goods of his own of the same description. The entry being made under a wrong denomination, both parcels were seized. It was held that the bailee, not being of any trade or profession which implied skill, having stipulated for no reward, and having taken the same care of the goods of A. as he had of his own, was not liable for the loss. In *Dartnall v. Howard*(c), the defendant was held to be liable on the ground that he had undertaken the investment of the monies in the character of an attorney, a character which implied *skill*. It might have been added, a character which implied payment also. So also in *Whitehead v. Greetham* (d). Here the plaintiff has thought proper to introduce an allegation that the defendants were *bankers* in London; but he has not alleged any usage by bankers to undertake to forward the moneys of all comers to any part of the kingdom (e) which the party may point out; nor is it alleged that the defendants have held themselves

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(a) 2 Lord Raym. 909.

(b) 1 H. Bla. 158.

(c) 4 B. & C. 345; 6 D. & R. 438.

(d) M'Cl. & Y. 205; 2 Bingh. 464; 10 B. Moore, 183.

(e) The declaration originally stated that the plaintiff was a *customer* of the defendants; but this allegation being traversed, was struck out.

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out as persons willing to forward money in that manner: without some allegation of this kind the Court will not take judicial notice of the mode in which the business of a banker in London is carried on. But if it would, it is perfectly notorious that the business of a London banker is to receive the money of his customers, whereby he becomes their debtor, *Sims v. Bond* (a), and to pay it out upon their cheques; and that he does not remit money to other places, except as a special favour, for the purpose of obliging a customer, in case the banker happens to have correspondents at the place in which the customer wishes the money to be paid.

The promise is here laid upon a *past* consideration, and there is nothing to connect that consideration with the subsequent promise. That this is necessary appears distinctly from *Hayes v. Warren* (b): there the count objected to was for work and labour done by the plaintiff for the defendant, in consideration whereof the defendant promised to pay; and the judgment was reversed in error on the ground that this was a past consideration, not laid to have arisen at the request of the defendant. *West v. West* (c); *Oliverson v. Wood* (d); *Cotton v. Wescott* (e) [Parke, B.—An express promise to pay is stated in the declaration. Lord Abinger, C.B.—The promise is stated to have been made in consideration of the *premises*, which premises are the parting by the plaintiff with his money. Is not this a detriment to the plaintiff?] The parting with the money by the plaintiff for the purpose of its being transmitted to Northampton was a benefit to the plaintiff, but to the defendants merely a trouble and a charge. [Parke, B.—A precedent request is necessary only where the consideration is executed. Here

(a) 2 Nev. & Man. 608; 5 1 Vin. 279.

Barn. & Adol. 389.

(d) 3 Lev. 366.

(b) 2 Stra. 933.

(e) 3 Bulst. 187, and see *Bagge*

(c) 1 Roll. Abr. 11; translated, v. *Slade*, Ibid. 162.

the question is whether the promise is not contemporaneous with the delivery of the money. Lord Abinger, C. B.—In this case an agreement appears to be expressly stated. The plaintiff agrees to pay 650*l.* into the hands of the defendants, and they agree to repay it at Northampton.]

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The Court then suggested that the plaintiff should amend, by averring that the money had been deposited at the request of the defendants. But it was stated by *Barstow* for the plaintiff, that he had considered the point, and had come to the conclusion that no amendment could be safely made.

Barstow, *contra*.—This declaration discloses in substance an absolute undertaking to pay the money at Northampton. [*Alderson*, B.—If it is in substance that, why do you not aver it?] This is not like the delivery of corn in a sack, or of money in a bag, from which the bailee can have no benefit. *Wheatly v. Low* (a) shews that the consideration here laid is sufficient. There it was held that if A. accepts money from B. to deliver it over to C., the acceptance of the money is a good consideration to charge him in assumpsit at the suit of B., upon a promise to pay the amount to C.; that case, in which the acceptance was in no particular character, is recognized in *Jones on Bailments* (b). [*Parke*, B.—You have not averred an acceptance on the special terms. I presume you have not looked at the record in *Wheatly v. Low*.] In *Whitehead v. Greetham*, the delivery of money to the defendant was held, after verdict, to be a sufficient consideration for an undertaking to lay out the money upon proper security. [*Parke*, B.—There it was after verdict.] The plaintiff in this case could not have redemanded the money from the defendants in London.

(a) *Cro. Jac.* 667.

(b) *P.* 51.

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After the special delivery he was bound to receive it at Northampton, and the defendants derived a benefit from a right to retain the plaintiff's money in their own hands. [Parke, B.—You say there was a binding agreement to pay the money at Northampton, which could not be put an end to but by mutual consent.]

Manning in reply.—If there was a binding agreement, it will follow that the plaintiff could not have required the defendants to repay the money in London; but the sole question between the parties is, whether upon the face of this declaration there is a binding agreement; whether the acceptance of money not paid at the defendant's request, is a sufficient consideration for a promise to pay the amount at a distant place *at all events*. [Parke, B.—Whether it does not import a promise at the time to pay a like sum of money.]

LORD ABINGER, C. B.—Where a party undertakes to pay money at a certain time, no request of payment (*a*) is necessary. Here at the time the money was paid in, the agreement was that the money should be paid at a certain day. Do not you think you had better amend, and plead the general issue?

PARKE, B.—If the allegation in the declaration means, that at the time the money was paid in, the defendants engaged to pay the money absolutely at Northampton, there seems to have been a good consideration to support the promise. *Wheatly v. Low*, if correctly reported, will enable us to put the construction upon the declaration. Had you not better consider whether you will amend, and look at the case of *Wheatley v. Low*, to see what was the allegation on the record? Upon the plea of the general

(a) In this case a request by the plaintiff was laid, but none by the defendants.

issue, if it appears that there was not any undertaking to guarantee payment at Northampton, or if upon further examination the consideration shall appear to be insufficient, the plaintiff cannot recover. I feel pressed by the authority of *Wheatly v. Low*, and I think it advisable that the rolls should be searched for the purpose of ascertaining in what manner the consideration and the promise are there laid. Should a verdict be found for the plaintiff, the defendants may move in arrest of judgment, if upon examining the roll in *Wheatly v. Low*, or upon further consideration, that course should appear to them to be advisable.

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Leave given to withdraw the demurrer and plead, on payment of costs (a).

(a) The defendants afterwards pleaded non-assumpsit; that the money was paid upon the terms mentioned in the declaration, and that the plaintiff accepted back the 650*l.* in full satisfaction. The action was compromised, and no search was made for the roll in *Wheatly v. Low*, which from the contemporaneous report in Palmer, 281, (*Loc's case*), would rather appear to be correctly reported upon this point; and see 2 Lord Raym. 920; *Anon.* 1 Ventris, 45.

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ASSUMPSIT for work and labour, care, diligence, and attendance as the agent of the defendant, and on his retainer, and for certain commission and reward then due and of right payable from the defendant to the plaintiff, with counts for money paid, and on an account stated, and for interest.

Pleas — first, non-assumpsit; secondly, a set-off; thirdly, to the first count, that the work, labour, care, diligence, and attendance in that count mentioned, and therein alleged to have been done, performed, and be-

A broker cannot maintain an action for work and labour, and commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 16.

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stowed by the plaintiff as the agent of the defendant, were and are work and labour, care, diligence, and attendance done, performed, and bestowed by the plaintiff within the city of London as a broker, to wit, as a stock-broker, in and about the purchasing and selling for and on account of the defendant, and bargaining for and on account of the defendant, for and in respect of divers interests and shares in divers public stocks and securities, and divers public bonds and other public securities, and that the commission in the said first count mentioned was and is commission claimed by the plaintiff for and in respect of such work, labour, care, diligence, and attendance as aforesaid so done and performed by him the plaintiff as a stock-broker. And the defendant says, that the plaintiff was not at the time or times, or any of them, of doing, performing, and bestowing the work, labour, care, diligence, and attendance, or any of them, or any part thereof, a broker duly licensed, authorized, or empowered to act or practise as a broker in the premises or any of them within the said city of London. Verification.

Replication, to the second plea, nil debet, and to the last plea, de injuriâ.

At the trial before *Parke*, B., at the London Sittings after last Trinity Term, it being proved that the plaintiff was not a sworn broker in the city of London, the jury, under the direction of the learned Judge, found a verdict for the plaintiff on the first and second issues, and for the defendant on the third; and they assessed the damages on the first count at 24*l.* 2*s.* 6*d.*, and on the other counts at 95*l.* On a former day in this term, *Bompas*, Serjt., obtained a rule to enter up judgment for the plaintiff on the third issue, non obstante veredicto, on the ground that the plea was bad in law.

Platt and *Petersdorff* now shewed cause.—The ques-

tion is, whether the third plea was a good answer to the action as to the first count of the declaration; and it is submitted that it clearly is. By the 6 Anne, c. 16, s. 4, it is enacted, "that all brokers who shall act as brokers within the city of London and liberties thereof shall, from time to time, be admitted so to do by the Court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable; and shall, upon such their admission, pay to the Chamberlain of the said city for the time being, for the uses hereinafter mentioned, the sum of 40*s.*, and shall also yearly pay to the said uses the sum of 40*s.* upon the 29th day of September in every year." It then provides that all such monies should, in the first place, be applied in the paying and satisfying one William Stewart (who was lessee of the profits of the office of Garbler within the city of London) the sum of 967*l.* 10*s.*, for a compensation for his interest in the said office; and that, after the payment of that sum, "all the monies arising by such admissions and yearly payments shall go to and be enjoyed by the said Mayor and Commonalty and Citizens of the city of London." Proviso, "that if any person shall take upon him to act as a broker, or employ any other under him to act as such, within the said city and liberties, not being admitted as aforesaid, every such person so offending shall forfeit and pay, to the use of the said Mayor and Commonalty and Citizens of the said city, for every such offence the sum of 25*l.*, to be recovered by action of debt," &c. The former Act of 8 & 9 Will. 3, c. 32, inhibits in terms the acting as a broker without being properly licensed. [*Parke, B.*—That statute had expired before the statute of Anne was passed.] The intention of the Legislature was to prevent improper persons from practising as brokers, for the protection of the public. There are two propositions to be considered in this case. The first is, whether a stock-

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broker is a broker within the meaning of the 6 Anne, c. 16. [*Parke*, B.—That was settled by the Court of King's Bench in *Clarke v. Powell* (a). It was there decided that a stock-broker is a broker within the 6 Anne, c. 16, and 57 Geo. 3, c. lx. (b), and liable to the penalty imposed by the latter statute for acting as a broker without having been admitted by the Court of Mayor and Aldermen of London.] Taking that as settled; secondly, these acts were not made for mere revenue purposes, but for the protection of the public against fraud: but if both objects were contemplated by the act, then the plaintiff cannot recover. The statute 13 Edw. 1, st. 5, also contains a prohibition against brokers acting within the city of London without being sworn before the Mayor and Aldermen (c); and though it is a statute of a very ancient date, it is still in force, it never having been repealed. The statute 1 James 1, c. 21, recites, that frauds had been committed by upstart brokers, and its object was the prevention of frauds by brokers. It is true that one of the objects of the statute of Anne appears to be to increase the revenue of the city of London, but the primary object of that, as well as of the former acts, was the protection of the subject. There are several cases in which it has been intimated, that the want of legal qualification in the broker would be a good ground of nonsuit: *Gibbons v. Rule* (d), *Ex parte Dyster* (e), *Green v. Weaver* (f). In *Johnson v. Hudson* (g), a factor, who sold a parcel of prize manufactured tobacco, without having entered himself with the Excise office as a dealer in tobacco, nor hav-

(a) 4 B. & Ad. 846; 1 Nev. & Man. 492.

(b) By which latter statute the penalty was increased to 100*l*.

(c) Ne nul abrocour ne seit denz la citee forceaus qe soent receuz e jures devant le gardeyn

ou Meyre e Aldermans.

(d) 4 Bing. 301.

(e) 1 Merivale, 155; 2 Rose's, B. C. 349.

(f) 1 Simons, 404.

(g) 11 East, 180.

ing any licence as such, was certainly held entitled to recover; but that was because it was the breach of a mere revenue regulation, which was protected by a specific penalty. The object of those statutes was clearly one of revenue, and nothing more. But in *Law v. Hodson* (a), it was held that the stat. 17 Geo. 3, c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, the seller could not recover the value of bricks sold under the statutable size. [Parke, B.—Very considerable doubt was thrown on the distinction which has been taken between breaches of laws passed for revenue purposes and others, in the case of *Brown v. Duncan* (b); and when it comes to be considered, I think that distinction will be overruled.] The whole depends on the object of the legislature; and if in this case it can be shewn from the recitals in the 1 Jac. 1, c. 21, and from this statute, and from the evils pointed out, that its object is to protect the public, then the plaintiff cannot maintain an action for any thing which he does in breach of the provisions of the statute. In *Green v. Weaver*, which was a bill filed against a broker for a discovery by his employer, the Vice-Chancellor, in giving judgment, after stating the case, says (c), "Upon a case thus stated, I think that two propositions may be assumed: first, that the policy of the law not only requires that a broker or agent should act with fidelity to his employer, and should be ready at all times to render a full and clear account of his transactions; but, secondly, from the nature of this case, the defendant must possess, and perhaps exclusively possess, the means of stating that account, which the policy of the

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(a) 11 East, 300.

Ry. 114.

(b) 10 B. & Cr. 93; 5 M. &

(c) 1 Simons, 424.

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law entitles the plaintiff to demand." And he adds (a), "If I decide that the defendants are not bound to answer, I may render those acts of Parliament, especially framed for the purpose of protecting principals from the dishonesty of their agents, a cover to their agents in the grossest and most scandalous frauds." The same doctrine is laid down in *Ex parte Dyster* (b). It is submitted, that as the facts disclosed on the third issue clearly shew that the plaintiff's cause of action, in respect of the portion of his claim covered by the third plea, is founded upon a breach of a legislative enactment, impliedly, by the imposition of a penalty, interdicting the right to sue for or recover the demands comprised in that issue, the defendant is entitled to retain his verdict as to that part of the record; and that, since the case of *Forster v. Taylor* (c), it may be safely advanced as a general proposition, that an act forbidden to be done under a penalty is in legal effect absolutely prohibited, and that the prohibition exists whether the penalty be introduced in a statute passed for a financial and revenue object, or for the general protection of society.

Bompas, Serjt. contra.—Although it may be admitted that a stockbroker is within the statute of Anne, and may render himself liable to penalties for practising as such without having been admitted by the Court of Mayor and Aldermen, yet he is entitled to recover for the work and labour which, at the defendant's request, he has bestowed upon his business. First, the stat. of Edw. 1, which has been referred to, is not a general law, but for the city of London only, and it contains no special regulation

(a) 1 Simons, 426, 427.

(c) 5 B. & Adol. 887; 3 Nev.

(b) 2 Rose's B. C. 349; S. C. 1 & Man. 224.

Merivale, 155.

for brokers only, but applies to a great many other matters which are now obsolete; as, for instance, it contains a provision that persons shall not walk in the streets after curfew, which was eight o'clock in the evening. The act of 8 & 9 Will. 3, c. 32, which was passed expressly for the regulation of brokers, did contain a prohibition, that unless duly licensed, a broker should not be allowed to practise; but that statute was allowed to expire, from which it may be inferred that the legislature did not intend that such a prohibition should be continued; particularly as the stat. of Anne contains no express prohibition. [Parke, B.—The stat. 13 Edw. 1, st. 5, has not expired; and the stat. 1 Jac. 1, c. 21, recites, that the city of London, “of long and of ancient time,” had been used to select brokers.] The stat. of Anne is not a general act, but is confined to the city of London only, and is therefore a local act, and the defendant ought to have set it out in pleading. [Alderson, B.—It applies generally to all the King’s subjects who come into the city of London, and who seek to practise as brokers there. Parke, B.—And it is printed amongst the public acts.] Then, the statute merely requires that the broker shall be *admitted* to practice by the Mayor and Aldermen; but the plea is, that the defendant was not a broker “duly licensed, authorized, or empowered” to act or practise as a broker. [Parke, B.—“Admitted so to do,” is the same as allowed or authorized so to do. Gurney, B.—Admission is authority. Parke, B.—This is after verdict, and the Court must look to the substance of the plea.] Then the object of the provision of the statute of Anne was to raise a revenue to the city of London by granting licences, and not with a view to the regulation of brokers: and therefore this contract was not prohibited by it. Without arguing on the distinction which has been taken between a prohibition of a contract for revenue purposes and

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others, the contract in the present case is not prohibited. There is a distinction between a prohibition and the mere imposition of a penalty. In *Gremaire v. Le Clerc Bois Valon* (a), it appears to have been held by Lord *Ellenborough*, that a surgeon practising in London, without being licensed by the College of Surgeons, though liable to a penalty for so doing under 3 Hen. 8, c. 11, was nevertheless entitled to maintain an action for business done as a surgeon, the statute containing no prohibitory clause. That case has been considered law, and has been always acted on in every action on a surgeon's bill. The present case is much stronger than that, as this is not in the nature of a general penalty, but of a penalty to be paid to the city of London only. [*Parke, B.*—It seems to be assumed, on the motion for a new trial in that case in the Court above, that the plaintiff was duly licensed, from the circumstance that it had not been proved that he was not regularly licensed.] There is a difference between that case and an action on an apothecary's bill, because in the Apothecaries' Act there is a prohibitory clause. [*Alderson, B.*—Proof of the licence is required in the one case and not in the other.] In the case of *Law v. Hodson*, the statute was meant to prohibit bricks under a particular size from being sold, and the regulation was intended to prevent frauds. And *Little v. Poole* (b), which was the case of coals being sold without a ticket, was determined on the same principle. But when the act itself is not illegal, but the illegality arises from something collateral, a plaintiff is not precluded from recovering. In *Ex parte Dyster* (c), where a broker was alleged to have been a trader, contrary to the condition of his bond, he was allowed by the Lord Chancellor to prove for a debt incurred in such trading. That is a case under the same statute: the one is disobedience of the regulations made

(a) 2 Camp. 144.

(b) 9 B. C. Cr. 192.

(c) 1 Mer. 155; S. C. 2 Rose,

B. C. 349.

by the Mayor and Aldermen under the authority of the statute; the other is of the provisions of the statute itself. The statute makes the regulations equally obligatory as the statute itself. That is therefore a decision in the plaintiff's favour.

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Cur. adv. vult.

The judgment of the Court was afterwards delivered by PARKE, B.—In this case, which was argued a few days ago, the plaintiff moved for judgment non obstante veredicto, on the ground that a plea in bar was bad in law. The plea was, that the work and labour, in respect of which the action was brought, was performed by the plaintiff as a broker in London, and that he was not duly licensed, authorized, and empowered to act as a stock-broker by the Court of Mayor and Aldermen, pursuant to the statute. We are of opinion that the plea is good in substance, and consequently the rule must be discharged.

It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. Lord Holt, *Bartlett v. Vinor* (a). And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract*? In the cases of *Brown v. Duncan* (b), and *Wetherell v. Jones* (c), both cases of vio-

(a) Carthew. 252.

M. & Ry. 114.

(b) 10 B. & Cress. 93; 5

(c) 3 B. & Ald. 221.

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lation of the Revenue Laws, the particular contract sued upon was held not to be interdicted; and in *Johnson v. Hudson (a)*, as explained in the judgment of the Court of King's Bench in *Foster v. Taylor (b)*, the provision of the statute, which requires persons dealing in tobacco to take out a licence, was held to be a regulation attaching to the plaintiff personally, and affecting him with the penalty, for the purpose of securing the licence duty only, and not forbidding the contract itself; though it is to be observed, that some little doubt has been thrown on the particular case in a very learned work, 2 Starkie on Evidence, 886. The principle, however, of that decision, as above explained, is correct; and the question for us now to determine is, whether the enactment of the statute 6 Ann, c. 16, (altered as to the amount of penalty by 57 Geo. 3, c. 60), is meant *merely* to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether *one* of its objects be the protection of the public, and the prevention of *improper* persons acting as brokers? On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; on the latter it is: for it cannot be permitted to a person to recover a compensation for an act which the law interdicts him from doing. In order to decide this point, it is only necessary to look at the statute itself. If its object had been simply the pecuniary advantage of the Mayor and Corporation, it would have been wholly unnecessary to have made any provision for securing *the good conduct* of the persons admitted. The more that should be allowed to practise, the larger the revenue of the city; but the enactment, that all persons who should act as brokers should be admitted by the Court of Mayor and Aldermen under such restrictions and limitations for *their honest and good behaviour* as the

(a) 11 East, 180.

(b) 5 B. & Ald. 898; 3 Nev. & Man. 244.

Court should think fit and reasonable, shews clearly that the legislature had in view, as *one* object, the benefit and security of the public in those important transactions which are negotiated by brokers. The clause, therefore, which imposes a penalty, must be taken (in the language of Lord *Holt*, above referred to) to imply a prohibition of all unadmitted persons to act as brokers, and consequently to prohibit, by necessary inference, all contracts which such persons make for compensation to themselves for so acting; and this is the contract on which this action (so far as it relates to brokerage) is brought.

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This provision of the statute, so construed, is in affirmance of the right of the Mayor and Aldermen to admit brokers, which appears to have existed in the earliest times, and that for the convenience of trade and the public good, as may be collected from the statute 13 Ed. 1, st. 5, and the recitals in the 1 Jac. 1, c. 21, and in the 8 & 9 Wm. 3, c. 32.

The distinction between this and the case of *Ex parte Dyster* (a), which was cited on behalf of the plaintiff, is very clearly explained by Lord *Eldon* in his judgment. The prohibition to act without admission, is statutory; the regulations adopted by the Mayor and Court of Aldermen in the case of admitted brokers are not; they are purely municipal, and have not the force of a general law: the only consequences of their violation are those which the regulations prescribe.

One other case cited for the plaintiff remains to be noticed; it is that of *Gremaire v. Le Clerc Bois Valon* (b), in which Lord *Ellenborough* held that the plaintiff could recover for surgery and medicines, though he had not been admitted pursuant to the statute 3 Hen. 8, c. 11, s. 1. It is certainly difficult to reconcile this case with the rule above laid down, for the provisions of that statute were

(a) 2 Rose's Bankrupt Cases, 349.

(b) 2 Camp. 144.

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clearly meant to secure to the public skilful practitioners in surgery and medicine; but, on a motion for a new trial, the Court of King's Bench do not appear to have sanctioned the doctrine of Lord *Ellenborough*, for they disposed of the case on another ground, namely, that there was no proof that the plaintiff had *not* been duly licensed. We therefore think that case is not a binding authority; and, for the reasons above given, are of opinion that the rule must be discharged.

Rule discharged.

ATTORNEY-GENERAL v. HILL and MORRIS.

The King's
dock yards are
not assessable
to the land-tax.

THIS was an information for trespass and intrusion by the defendants, by distraining certain goods and chattels in his Majesty's dock yard at Deptford; to which the defendants pleaded the general issue; and the cause coming on to be tried at the sittings after Easter Term, 1836, before Lord *Abinger*, C. B., a verdict was taken for the Crown for 58*l.* 2*s.* damages, subject to the opinion of the Court upon the following case.

The complaint on the part of the Crown is the making a distress for land-tax for the dock yard at Deptford, on the 26th November, 1835. The defendant Hill is the collector and one of the assessors of the land-tax for the parish of St. Nicholas, Deptford, in which his Majesty's dock yard is situate. The defendant Morris is a broker, who acted under the direction of Hill in making the distress. Both the defendants were present when the distress was made, and acted in the execution of it. At the time of making the distress, the defendants left the following notice of distress upon the premises:—

“To the Commissioners of his Majesty's Navy.

“Take notice, that by the authority and on the behalf of Mr. G. Hill, collector of the King's taxes, I have

this 26th day of Nov., 1835, distrained on the several carts, horses, and wood, specified in the schedule or inventory hereunder written, in the dock yard, in the parish of Deptford, in the county of Kent, being for 56*l.* 17*s.* 6*d.*, taxes due to the collector at 29th September, 1835; and if you do not pay the 56*l.* 17*s.* 6*d.*, together with the costs and charges of this distress, on or before the expiration of four days from the date hereof, I shall cause the said goods and chattels to be sold according to law. Given under my hand this 26th day of Nov., 1835.

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Yours, W. Morris."

"Schedule or Inventory.

Horse and Cart, 39 Lots of Wood, Cart, Cart and Horse	
Land-tax	£56 17 6
Levy	1 1 0
Man per day	0 3 6
	<hr/>
	£58 2 0

Yours, W. Morris,
Hogan-row, Deptford."

The following is an extract from the Assessment to the land-tax for the year 1835, under which the distress in question was made.

"No. 2. *Land-tax Assessment.*

"In the parish of Deptford,
in the division of Blackheath,
in the county of Kent. } An Assessment made for
granting an aid to his Majesty
by a land-tax to be raised in Great Britain, for the service
of the year 1835, in pursuance of an act passed in the
38th year of the reign of his late Majesty Geo. 3, inti-
tuled 'An Act for granting an aid to his Majesty by a
land-tax, to be raised in Great Britain for the service of

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the year 1798,' and of another act passed in the 42nd year of his said late Majesty's reign, intituled 'An Act for consolidating the provisions of the several acts passed for the redemption and sale of the land-tax into one act, and for making further provision for the redemption and sale thereof.'

" Assessed by us,

" Godfrey Hill, } Assessors.
G. Medwin,

" We do hereby return Godfrey Hill and George Medwin, as able and sufficient persons, being within the limits and bounds of the said parish of Deptford, to be collectors of the monies as aforesaid.

" Godfrey Hill, } Assessors."
G. Medwin,

Rental.	Names of Proprietor.	Names of Occupiers.	Names and descrip- tion of Estates or Property.	Sums as- sessed and exonerated.	Sums assessed and not exonerated.		
£					£	s.	d.
80	King's Dock Yard.	W. Cockeraft	- - - - -	- - -	4	6	8
40	- - -	W. Bowley	- - - - -	- - -	2	3	4
40	- - -	James Brown	- - - - -	- - -	2	3	4
75	- - -	Mr. Benstead	- - - - -	- - -	4	1	3
70	- - -	J. W. Bailey	- - - - -	- - -	3	15	10
50	- - -	C. Lang	- - - - -	- - -	2	14	2
70	- - -	Mr. Kent	- - - - -	- - -	3	15	10
65	- - -	Mr. De Montmorency	- - - - -	- - -	3	10	5
45	- - -	J. Eddy	- - - - -	- - -	2	8	9
35	- - -	Officers' Barracks	- - - - -	- - -	1	17	11
2100	Commissioners of H. M. Navy for all the Wharfs, Warehouses, &c.	- - - - -	Docks, Slips, }	- - -	113	15	0
200	- - -	For Mill	- - - - -	- - -	10	16	8

" Kent (to wit).—Allowed by us, Commissioners of the land-tax for the county of Kent, the 1st day of July, 1835.

Joseph Jackson, (L. s.)
G. Smith, (L. s.)"

The dock yard at Deptford, upon which the assessmen

and distress in question were made, is the property of the Crown, and is wholly used for public purposes, and produces no rent or revenue whatever. There is a part of the dock yard, upon which the houses of certain officers of the establishment stand, and which houses are officially occupied by them, and for which they pay no rent, which is separately assessed to the land-tax; but the assessment and distress in question do not affect that part of the dock yard.

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The dock yard has been from time to time enlarged, but since the year 1797, when the land-tax act was passed by which the quotas to be raised by each county were settled, nothing has been added except some small quantity of ground for the gardens attached to the officers' houses, which are separately assessed and paid for.

It is admitted that the dock yard has for many years past been included in the land-tax assessment, and the amount paid without objection, until the assessment in the last year, which is the assessment in question. An appeal was made on the behalf of the Lords Commissioners of the Admiralty against the last assessment upon the dock yard, to the Commissioners of land-tax for the district, as directed by the land-tax acts, and the appeal was heard on the 25th of Sept. 1835, and determined against the appellants; after which the distress in question was made, and certain goods of the Crown, mentioned in the notice of distress, were seized and distrained by the defendants.

The question for the opinion of the Court is, whether his Majesty's dock yard at Deptford, being the property of the Crown, and used only for public purposes, is liable to be assessed to the land-tax; and whether distress can be made thereon, or on the goods of the Crown, for the land-tax duty (if assessed), in case of non-payment. If the Court should be of opinion that the assessment or distress ought not to be made upon the dock yard, then the

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verdict for the Crown is to stand; otherwise a verdict to be entered for the defendants.

Wightman, for the Crown.—It is a general proposition of law that the Crown is not bound by a statute, unless expressly mentioned as a party to be bound: and it would indeed be a strange inconsistency if the Crown could be taxed for a sum payable to itself. The question is, therefore, whether by any of the land-tax acts, the Crown is expressly bound. The 17th section of the 38 Geo. 3, c. 5, relating to the mode of levying and collecting the land-tax, enacts, that “if any person shall refuse or neglect to pay any sum or sums of money whereat he or she shall be rated or assessed, in England, Wales, or Berwick-upon-Tweed, by that act, upon demand by the said collector or collectors of that place, according to the precepts or estreats to him or them delivered by the Commissioners, then and in every such case it shall and may be lawful to and for the said collectors, or any of them, and they are hereby authorized and required, to levy the sum assessed by distress and sale of the goods and chattels of such person so neglecting or refusing to pay, or distrain upon the messuages, lands, tenements, and premises so charged with any such sum or sums of money, without any further authority from the commissioners for that purpose.” So that the collectors may, if they please, not only distrain upon the premises for which parties are charged to the land-tax, but they may distrain generally the goods and chattels of the person refusing or neglecting to pay. In this case, therefore, the collectors would be empowered to distrain upon the Commissioners of the Navy, (supposing them to be the parties charged, as being the parties to whom the notice of distress is addressed), either in Somerset House, or elsewhere, wherever they may reside. Or if it be his Majesty who is to be taken

as the person employing them, and they are merely his servants, he would be the party primarily liable, and the collectors may distrain his Majesty's goods.—The Court then called on

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R. V. Richards for the defendants.—It is true that the Crown is not specifically named in the land-tax acts, as to be charged with the duty; but on a careful review of the several acts, it will appear by necessary implication that it was the intention of the legislature that the Crown should be charged. That question depends upon the construction—first, of the several acts relating to the imposition, and secondly, of those relating to the redemption, of the land-tax. By the 38 Geo. 3, c. 5, the tax was imposed, not only upon the several counties forming the kingdom, but several districts, some large and some small, were themselves pointed out by the act as districts to be subjected to the duty. Now, if the construction contended for on the other side is to prevail, this consequence would follow: Supposing that, for the convenience of the public service, the dock yard should be extensively enlarged; this small district of Deptford being charged with a certain sum, the payment of the whole sum would be thrown upon perhaps a ninth or a tenth, instead of the whole, of the district intended by the act of parliament to bear the charge. It is not necessary to go back to the act of 4 W. & M. c. 1, the provisions of which are in substance the same as those of the 38 Geo. 3, c. 5. [*Bolland, B.*—The preamble of the 4 W. & M. c. 1, states the object to have been to grant an aid to the Crown, *in order to carry on a vigorous war against France*. Was the meaning of that to call upon the King to pay into the hands of himself the money to carry on the war? *Parke, B.*—So also, in the preamble of the 38 Geo. 3, c. 5, we must read it—a grant *to* his Majesty of rates and assessments *upon* his Majesty.] This is not a rate upon his Majesty, but upon

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this particular district of property. The 98th section of that statute enacts, that the act shall not be construed to charge her Majesty the Queen with the duty for or in respect of any sum or sums of money as annuities given or granted by his Majesty to her Majesty, but that such sums, &c., and her Majesty, and her Treasurer or Receiver-General for the time being, in respect of the same, shall be free and clear of all taxes, &c., anything in the act to the contrary notwithstanding. The act then goes on to exonerate the Prince of Wales as Duke of Cornwall, and the other members of the Royal Family. Then the redemption act of the same year, 38 Geo. 3, c. 60, s. 45, states, that "it shall be lawful for the surveyor-general of the land revenues of the Crown, in respect of the land-tax charged on *the manors, messuages, lands, tenements, rents, or other revenues of the Crown*, within the receipt and survey of the Exchequer for the time being, with the consent of the Lord High Treasurer, or the Commissioners of the Treasury for the time being, and for the Chancellor and Council of the Duchy of Lancaster for the time being, in respect of the land-tax charged on the manors, &c., or other revenues of the Crown, within the survey and receipt of the said Chancellor and Council, &c., and for the surveyor-general of the Duchy of Cornwall in respect of the land-tax charged for the manors, &c., or other revenues of the Duchy of Cornwall, to contract and agree with the commissioners specially to be appointed for the purposes of the act, for the redemption of the land-tax charged upon any of the said manors, &c., and to proceed to the completion of such contract, in such and the like manner in all respects as is thereinbefore directed in case of redemption of any land-tax." The next section empowers his Majesty to appoint commissioners for ascertaining the proportions of the land-tax on the revenues of the Crown, within the survey and receipt of the Exchequer, and to certify to the Treasury the proportions of such land-tax,

and the several parishes and places within which the manors, &c., or other revenues on which the same is charged and payable. Then s. 47 empowers the surveyor-general of the land revenues of the Crown to contract with any person or body corporate for the sale of such or so much of the manors, &c. belonging to the Crown as are within the survey and receipt of the Exchequer, sufficient for the redemption of the land-tax charged upon the manors, &c., or any other revenues of or belonging to the Crown; so that the lands to be sold are the lands in the receipt and survey of the Exchequer, and the prices to be paid for redeeming the land-tax are imposed generally on the lands and revenues of the Crown. No construction can be given to this provision, unless it be held that it was the intention of the former act, under the general words "lands, tenements," &c., to include the property of the Crown. By the tenth section of the 42 Geo. 3, c. 116, which was passed in furtherance of the plan for redeeming the land-tax, all persons are to be at liberty to redeem, except tenants at rack-rent, &c., and except *tenants* holding under the Crown any lands or tenements within the survey and receipt of the Exchequer. This refers to lands held by the tenants of the Crown: but the 28 Geo. 3, c. 5, s. 47, does not speak at all of lands in the hands of tenants, but furnishes a general inference that all the lands of the Crown were to be subject to that charge. There are several subsequent acts, also providing for the redemption of the land-tax charged on the Crown lands, re-enacting or incorporating the 47th section of the 38 Geo. 3: and in many modern acts imposing taxes, particularly the Assessed Tax Act, 57 Geo. 3, c. 93, the words being general, that all persons shall pay, it has been thought necessary to grant to the Crown and certain members of the Royal Family an exemption in express words; raising the inference that without such exemption they would be liable. So in the Post-office Act, the Crown

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letters are directed to be free of postage. [*Gurney*, B.—

One of the properties charged with the proportions of the land-tax by the 38 Geo. 3, c. 5, is, “the palaces of Whitehall and St. James.” That seems to furnish you with a stronger argument than you have yet raised.] That is so; and it is difficult to see what beneficial occupation there is in the palace of St. James which can be rated, unless the property now in question be rateable. [*Gurney*, B.—I believe the palace of Whitehall would include a considerable district; all Privy Gardens, from Whitehall to this hall, probably. Lord *Abinger*, C. B.—And the verge of St. James’s Palace may extend over great part of Westminster.] If the Crown is not liable to pay this duty, it may enlarge its dock yards to any extent, and inflict on the other part of the district the whole of the burthen; *Harrison v. Bulcock* (a), *All Souls College v. Costar* (b).

The second point raised in the case,—the liability of this property to be taken by distress, must necessarily follow the first. [*Parke*, B.—Have you looked at the statutes exempting the Royal Family from the land-tax—30 Geo. 3, c. 58, and 34 Geo. 3. c. 173?] They extend to their personal exemptions, as to annuities granted by the Crown.

Wightman, in reply.—The 38 Geo. 3, c. 60, s. 45, may be construed by applying it to the hereditary revenues of the Crown, within the survey of the Exchequer; whereas, for the purpose of the present case, it is only necessary to establish that lands vested in the Crown for public purposes are not liable to the tax. That construction is confirmed by the provisions of the 42 Geo. 3, c. 116, ss. 10 and 71, which prevent the tenants of the Crown, under

(a) 1 H. Bl. 68.

(b) 3 Bos. & P. 635.

leases for lives or years, from contracting for the redemption of the land-tax; the surveyor-general, therefore, in order that there may not be a perpetual charge on the estate, is empowered to interfere and redeem the tax, in respect of the extent of interest such tenants had in the lands. Moreover, it is not shewn that this dock yard is within the survey and receipt of the Exchequer; and the general rule being, that Crown lands held for public purposes are not liable to taxation, it was for the defendants to shew affirmatively that this case is taken out of the general rule. With regard to the rating of the palaces, that may be on several grounds. A number of persons have a beneficial occupation of various portions of land within the ambit of the King's palaces, who would no doubt be liable to be assessed. The tax is a charge, not only on land, but also on salaries, places, and pensions. The powers given to the collectors and commissioners of the land-tax to levy the sum assessed by distress and sale of the goods and chattels of the person neglecting or refusing to pay, or distrain on the messuage, &c., charged with the tax; and still further, to break open any house, or any chest, &c., where any such goods are; and if any person assessed shall neglect or refuse to pay his assessment for ten days after demand, to commit such person until payment;—are entirely inconsistent with the carrying on of the public services in these offices. In the present case, it would follow that the Commissioners of the Navy—if not the King himself—might be levied upon wherever they might be, or, if there were no distress, committed to gaol till payment of the rate, although having no personal or beneficial interest whatever in the land, and being merely the ministerial officers of the Crown. It is clear, that on the principle which has governed the Courts in the cases relating to parochial taxes, persons acting in the capacity of public commis-

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sioners cannot be personally charged; *Rex v. Terrott* (a), *Lord Amherst v. Lord Somers* (b). The same principle applies to the present case. [*Parke, B.*—The only difficulty in my mind is, to ascertain how the Crown land originally became chargeable with the land-tax. I should be glad to have that satisfactorily explained.]

LORD ABINGER, C. B.—There appears to be some doubt as to the manner in which the Crown land became liable to pay land-tax at all, and that doubt has not been cleared up by the discussion. Before we give final judgment on the subject, it may be as well, and more satisfactory, that we should receive that information. At the same time, I should be sorry it should be supposed that I entertain any doubt on the principle of the question, whether the Land-tax Act throws any liability on the lands of the Crown. I consider that the Crown is exempted from impost unless it is expressly mentioned in the act; *à fortiori*, from anything in the shape of a tax to be paid to the Crown. This is a grant to his Majesty, and it never can be supposed, independently of all technical rules, to be intended that his Majesty should take money out of one pocket to put it into another. But on the general principle, that the Crown is not liable without being expressly named, I should say that none of the clauses imposing the tax affect the lands of the Crown. That the clauses for enforcing the payment do not include the King, is clear; and my present opinion is, that the land thus occupied never could be charged. What other circumstances may have intervened, which would make lands in the hands of tenants liable, it is not necessary, though it may be satisfactory, to inquire. I am prepared in my own opinion to say, that the Crown is entitled to judgment on the construction of the case before us, though

(a) 3 East, 506.

(b) 2 T. R. 372.

the Land-tax Redemption Act has thrown some obscurity on the mode in which this duty had been imposed on the Crown land; and perhaps we shall give a more satisfactory judgment after we have received the explanation.

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The Court accordingly directed that inquiry should be made on this point, and the case stood over for that purpose; and on a subsequent day,

Lord ABINGER, C. B., said:—This case turned on the question, whether property occupied by the Crown could be subject to an assessment to the land-tax. The Court expressed its opinion at the time of the argument, but in consequence of some ambiguity which appeared to exist on the acts of parliament, as to the mode in which the property of the Crown in the hands of a subject became assessable to the land-tax originally, we requested some information before pronouncing our final judgment; not that we expected it would lead to any change of opinion, but we thought it would be more satisfactory if the origin of that mode of taxation could be explained. We are now informed by Mr. *Wightman* that he has made such inquiry, and he finds, what indeed we supposed to be the case, that originally it never was intended, in imposing the land-tax assessment, to free the tenants of the Crown within the survey of the Exchequer from this tax, but only the Crown itself for what it occupied, and that the Crown never could have been subject to this tax, unless particularly named, which is not the case here. Then this is the ordinary case of a supply granted by parliament to the King, for the purposes of public advantage, in which the subject, of course, is to bear all the tax imposed upon him; but the Crown, not being named, cannot be subject to the operation of the tax. The lands in question are in the occupation of the Crown—for the Crown and the public are the same for this purpose. To say that

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the dock yard, occupied by the immediate servants of the Crown for public purposes, shall be burthened with this tax, would be to say that the palace of the King was subject to it, for there is no more ground for it in the one case than in the other. Therefore we are of opinion, whatever the Commissioners may have thought in this case, that the assessment could have no effect whatever on the property of the Crown. The goods taken and levied under this distress are goods belonging to the Crown; they are the goods and chattels of the Crown, and subject the parties taking them to an action of trespass from the Crown. If we were to determine that the Land-tax Assessment Act attached on this property, we should in effect determine that the goods and chattels in the immediate use and occupation of the Crown, in the palaces of St. James and Whitehall, were liable to be laid hold upon for the land-tax; which would be a very absurd conclusion to come to. We are therefore of opinion that judgment should be entered for the Crown.

Judgment for the Crown.



FLEMYNG v. HECTOR, Esq. M. P.

ADAMS and Another v. O'BRIEN, Esq. M. P.

ADAMS and Another v. RIPPON, Esq. M. P.

Where a club was formed, subject to the following among other rules, viz. that the entrance fee on admission should be ten

guineas, and the annual subscription five guineas; that if the subscription were not paid within a certain limited period, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club, to be chosen at a general meeting; and that all members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them:—*Held*, that the members of the club, merely as such, were not liable for debts incurred by the committee for work done or goods supplied for the use of the club; for that the committee had no authority to pledge the personal credit of the members.

THESE were actions brought against the several defendants for work done, and goods supplied, for the use of the late "Westminster Reform Club," of which the defendants were members, under the following circumstances:—

The Westminster Reform Club was established in London in the year 1834, for the ordinary purposes of the clubs existing at the west end of the town, and on a similar footing, except that the members were to be chosen from among those professing political opinions in accordance with the principles of the Reform Act.

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At a general meeting, held on the 23rd of May, 1835, certain rules were agreed upon for the regulation of the Club, which were printed, and of which the following only are material to be noticed :

“ 6. That the entrance fee on admission to the club shall be ten guineas, and the annual subscription five guineas.

“ 8. That if the annual subscription be not paid within two months from the 14th of April, the defaulter shall cease to be a member of the club.

“ 10. That [certain persons therein mentioned] should be trustees for the club.

“ 19. That there should be a committee to manage the affairs of the club, consisting of thirty members, to be chosen by vote at a general meeting of the club.

“ 22. That there should be two general meetings of the club in each year.

“ 23. That at such meetings an ample statement of the affairs of the club should be presented, signed by the chairman of the committee and the secretary, and such statement should be exhibited in the coffee-room for examination, seven days previous to the meeting.

“ 28. That all members be expected to discharge their club bills day by day, the steward having positive orders not to open accounts with any individual, and being authorized to refuse to continue to supply parties neglecting to pay what they may owe, after payment is requested.”

A committee had been chosen on the first formation of the club, who took a furnished house in Great George-

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street for its use, at a rent of 1000 guineas per annum. Until the above rules were promulgated there were no written or printed rules; but resolutions were passed from time to time by the committee for the regulation of the society. The club was dissolved in February, 1836, and the members were called upon to pay a sum of eleven guineas each, in discharge of its liabilities. The defendants, among other members, refused to pay this sum, and these actions were in consequence brought against them.

Flemyng v. Hector, which was tried at the last Surrey assizes, before Lord Abinger, C. B., was an action by the plaintiff, a wine-merchant, for wines supplied to the club during the whole period of its existence. It appeared that the defendant was elected a member in April 1835, and paid his entrance-money and subscription, and continued to frequent and dine at the club until its dissolution; it was proved also that he was in the habit of asking for "Flemyng's wine." Two sums had been paid by order of the committee to the plaintiff on account of his bill, after the defendant was admitted a member, which were more than sufficient to satisfy the amount of the wine supplied while the defendant was a member; but they were not specifically appropriated, and the plaintiff applied them in satisfaction of the earlier items of his account. It was contended for the defendant, first, that he was not liable at all merely as a member of the club; secondly, that at all events the damages ought to be nominal, the payments being a satisfaction of the plaintiff's demand as against the defendant. The Lord Chief Baron expressed an opinion against the defendant on both points, and under his direction a verdict was found for the plaintiff for the full amount claimed, leave being reserved to the defendant to move to enter a nonsuit: and on a former day of this term, *Thesiger* obtained a rule nisi accordingly, against which cause was shewn by *Andrews*, Serjt., Sir *W. Follett*, and *Montagu Chambers*; and *Thesiger* and *Platt* were heard in support of the rule.

Adams v. O'Brien, which was also tried before the Lord Chief Baron, at the same assizes, was an action by ironmongers, who had supplied stoves and other ironwork, and let knives and forks, &c., to hire for the use of the club. The defendant was proved to have attended very frequently; and it was shewn that the committee made out a statement of the affairs and liabilities of the club, in which the plaintiff's claim was inserted, and that it was hung up in the coffee-room. In this case also a verdict was directed for the plaintiff, the same leave being reserved as in the former case. *Platt* obtained a rule for a nonsuit accordingly; *Andrews*, Serjt. and *Chambers*, shewed cause, and *Platt* supported the rule.

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While these rules were pending, the case of *Adams v. Rippon*, which was an action by the same plaintiffs, and of the same nature, as that of *Adams v. O'Brien*, was tried before *Bolland*, B., at the sittings in Middlesex. It appeared that Mr. Rippon, besides being a member of the club, had been named and chosen one of the committee; but he was not proved to have acted in that character, or to have taken any part in the proceedings of the club. Application had also been made to him to become one of the trustees, to which he consented; but he was not appointed. Evidence was given of a conversation between the defendant and the plaintiff's attorney, in which the former stated that he knew he was liable, but he had paid a sum of money already, and would pay no more, but would defend any action that might be brought against him. It appeared that he did not pay his subscription for the year 1835-6, until after the expiration of two months from the 14th April, 1835; and it was contended that he thereby ceased to be a member of the club from that day, and was therefore, at all events, not liable in respect of any goods subsequently supplied. The learned Judge considered himself bound by the rulings in the previous cases to direct the jury that the de-

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endant was liable as a member of the club ; and he left the question to them whether he continued a member for more than the first year. The jury found that he was a member for one year only, and gave a verdict accordingly for 7*l.* 10*s.*, the amount of goods furnished within that period. His lordship gave leave to move to enter a nonsuit, and such rule having been obtained, *Erle* and *Chambers* shewed cause, and *Platt* was heard in support of it.

The following is the substance of the arguments urged on either side in the several cases :—

For the plaintiffs.—The rules can be made absolute only on the ground that there was no evidence to go to the jury of the defendants' liability. The ruling of the Lord Chief Baron at the trial, that every member of a club is *primâ facie* liable for goods supplied for the common benefit of the club, is supported by the established practice at *nisi prius* for many years. The case may be considered either as one of partnership and joint liability, or one of principal and agent. The members are associated together for a common purpose, and for that purpose have a common house of meeting ; not certainly for the profit, but for the common advantage and gratification, of them all. Wherever, therefore, a contract is entered into by any of them, in promotion of the common purpose, all the members are liable. These orders, having been given by the committee, were consequently binding on the members generally, for whose benefit they were given. But if the case cannot be considered strictly as one of partnership, it was one of principal and agent. The committee, who are delegated by the whole body of the members to manage the affairs of the club, acting in the name and on the account of all the members, must of necessity, from the nature of the institution, have a discretionary power vested in them to make contracts with the tradesmen who are supplying the club with necessaries, and for the purpose of such contracts to pledge the credit of the association. Here the first step

taken was to contract for the hire of a house and the use of furniture, at a rent of £1000 a year, at a period when it does not appear that ten members had joined the club. That shows that the funds must necessarily have been insufficient to meet liabilities which, in the management of the club and in the very outset of it, it was essential the committee should incur; and it is impossible to suppose it could be intended that the committee should be personally responsible. As soon as a man becomes a member, it must be taken that he impliedly gives the committee authority to take such steps as were necessary to carry the objects of the club into complete effect. But even supposing they had not such authority originally reposed in them, yet, as the accounts were published to the association, and it was thereby made known to them that the committee had made these contracts, and it does not appear that the members repudiated or made any objection to them, they must be taken to have ratified the acts so done by the committee.—With reference to the case against Mr. Rippon, it was urged that, as he was actually appointed one of the committee, he must be held bound by their acts; or that, at all events, as the general rules were not in existence during the period for which he was found by the jury to have been a member, a nonsuit could not be entered, but the question, whether there was an implied contract by him through the committee, ought to be decided by the jury, without reference to the rules. The following cases were referred to:—*Delaunay v. Strickland* (a), *Raggett v. Musgrave* (b), *Raggett v. Bishop* (c), *Kearsley v. Codd* (d), *Maudsley v. Le Blanc* (e), *Braithwaite v. Skofield* (f), *Vice v. Lady Anson* (g), *Burle v. Smith* (h).

(a) 2 Stark. 416.

(b) 2 Car. & P. 556.

(c) Ib. 343.

(d) Ib. 408, n.

(e) Ib. 409, n.

(f) 9 B. & Cr. 401.

(g) 7 B. & Cr. 409. 1 Man. & Ry. 113.

(h) 7 Bing. 705; 5 M. & P. 735.

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For the defendants.—This clearly cannot be considered in the light of a partnership. It is altogether different from a trading or joint stock company; it is merely the case of an association of a number of gentlemen for a purpose altogether unconnected with any community of profit or loss; each furnishing his own subscription to a given amount, to form a fund which shall be available for all the purposes of the association. Nor is this a case in which the members of the club generally can be considered as principals, contracting through the committee as their agents. The rules shew clearly that the authority of the committee was limited to managing the affairs of the society, by means of the fund provided for them by the subscriptions. They had no authority, therefore, to incur debts on the credit of the individual members; they ought not to have made contracts beyond the limit of the subscriptions in hand. It is said that the exhibiting of the accounts in the club-house is evidence that the members recognised the contracts therein mentioned; but it could not be thence inferred that the committee had exercised, in making such contracts, an authority larger than that vested in them by the rules. The plaintiffs were bound clearly to make out, by affirmative proof, that the defendants were parties to the contract by themselves or their agents. The cases referred to were almost all cases of partnership in trade, or of joint stock societies. The decision in *Delaunay v. Strickland*, which is the only one at all resembling the present, proceeded on the ground of the plaintiff's personal concurrence in the order. The case against Mr. Rippon does not differ in substance from the others; for although he was named on the committee, it appears that he did not assume the office, nor interfere in any way in the management of the club.

Lord ABINGER, C. B.—I am free to own, that when these cases were tried before me at Guildford, I certainly

inclined to the opinion that the defendant was liable; but not supposing the matter to be so clear as not to be worth great consideration, I reserved the point fully for Mr. *Platt*, in both cases, for the opinion of the Court. I had thought, but without much consideration, at the Assizes, that these sort of institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them; that where there were a body of gentlemen forming a club, and meeting together for one common object, what one did in respect of the society bound the others, if he had been requested and had consented to act for them. Several cases have been cited in the course of the argument, which do not apply, with the exception of one of them, to societies of this nature. Trading associations stand on a very different footing. Where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole; so, any of the partners has a right, in any ordinary transactions, unless the contrary be clearly shewn, to bind the partnership by a credit;—he might accept a bill of exchange in the name of the firm, and as between the firm and strangers the partnership would be bound, although there might be an understanding in the firm that he was not to accept. It appears to me that this case must stand upon the ground on which the defendant put it, as a case between principal and agent; and I am the more inclined to look at it in that light, by an observation made by Mr. *Platt* in the course of the argument yesterday, on the subject of bills of exchange. I apprehend that one of the members of this club could not bind another by accepting a bill of exchange, acting as a committee man, even where there might be an apparent necessity to accept, as in the case of a purchase of a pipe of wine: the party might draw a bill, but I do not think he could accept the bill to bind the members of the club. It is, therefore, a question here

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Now for the committee, who are to conduct the affairs of the club as agents, are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the club at large; and that depends on the constitution of the club, which is to be found in its own rules: and upon two of the cases, those that were tried before me at Guildford, looking at these general rules, it certainly does strike me that it is impossible to interpret them so as to give the committee the power of dealing on credit, even for the purposes of the club. It appears by the rules, that every member is to pay his subscription of ten guineas as entrance money, before he can become a member, and a yearly subscription of five guineas; so that by the provisions of the club, there is to be a fund in hand in order to bear the expenses. But then, again, every member who makes use of the club, who either eats or drinks there, or takes any sort of refreshment, is to pay ready money. That shews again that the club was not disposed, and not intended, to have any transactions on credit, even with its own members; and it also shews that care was taken to provide ready money to meet every expense, so that if a party, or a gentleman of the club, were to order any particular thing that the club did not contain, he is to pay for it instantly: so that no occasion was expected to be necessary for the committee's pledging the credit of the club, or even their own. Under these circumstances, as the rules of the club, which are in writing, must be taken to form the constitution of the club, and are to be construed as matters of law, I do not see what there was to go to the jury—I do not see any thing in these rules of which the jury are to be the judges. The words are, "to manage the affairs of the club"—the question then is, what the affairs of the club are. They are to have in their hands a subscription, and they are to take care that every member pays it before he comes into the club, and pays for every thing he has in the club. It therefore appears that

the members in general intended to provide a fund for the committee to call upon. I cannot infer that they intended the committee to deal upon credit, and unless you infer that that was the intention, how are the defendants bound? It is very true that an order was made to pay Mr. Flemyng so much on account, but the moment you state the case as one of principal and agent, you see that something more was necessary in order to fix the defendant, than the mere fact that the committee did not pay the money the moment they ordered the wine. It has been decided in several cases, that where a party gives his agent money to obtain goods, which the agent obtains on credit, the principal is not liable; so that even if the defendant knew—supposing that he was to be presumed to know from the books of the committee—that there was a payment made to Flemyng, yet there is no account by which it has been proved that the committee had no money to pay it; there has nothing been proved which is required to be proved in order to fix the principal. Suppose a man gives money to his coachman to enable him to purchase hay and corn,—if the coachman takes the money and obtains the things either on his own or his master's credit, having the money in his pocket, his master is not bound; but if no money has been given, we must suppose it matter of necessity, and that he did buy on his master's credit. It appears, then, there is no evidence to shew that at the time this wine was ordered, or the sum of 100*l.* paid, the committee had not funds in hand, or at least Mr. Hector had no reason to suppose they had funds in hand. If they had, it was immaterial to him whether they chose to pay immediately, or whether they rather chose to pay at stated periods. I therefore think, upon these grounds, that in both these cases there ought to be a nonsuit entered. With respect to the case tried before my brother *Bolland*, the only difficulty I see in that case is Mr. Rippon's saying to the attorney's clerk that he might be liable,

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but that he would take the opinion of a court of law upon it; and Mr. Baron *Bolland*, knowing what had been held in the two cases that were tried at Guildford, declined to nonsuit the plaintiff, reserving the point for the defendant's counsel; and he then left to the jury this question:—"That supposing Mr. Rippon to be liable as a member of the club, then the question was, whether what he had said to the attorney's clerk made him a member beyond the period of the 14th of June, or whether it did not." The jury found that it did not, and that he was only a member up to the 14th of June. The verdict of the jury was plainly founded upon this;—they thought him liable merely by being a member, and that he was liable in the smaller sum, being the debt incurred during that time. In point of fact, I think there was nothing to leave to the jury. Supposing I am right in the opinion I now form, the mere fact of his being a member was not sufficient evidence; the conversation he had with the attorney's clerk shews that he meant to dispute his liability in a court of law, and it cannot be said that he chooses therefore to make himself liable. I think, therefore, the case tried before my brother *Bolland* must follow the same course as the others—that judgment of nonsuit must be entered. Now it may be said, and it has been urged very properly, and I own it made a considerable impression upon me, that it never could have been supposed that noblemen and gentlemen forming the committee in a voluntary association of this kind would consent to pledge their own credit individually; and I quite agree with that proposition: but I think, if the committee found they had not funds sufficient to carry the purposes for which the club was founded into effect, namely, that it should be a ready-money affair, they ought to have called a meeting, and exposed the state of the club, and called upon the society to support them. It is very well known that in many of these recent establishments great expense

has been incurred by building, and though the committee may have signed contracts for the building, yet it has always been done after a general meeting, and the sense of the whole club has been taken upon it; for you cannot suppose they would pledge their own credit to pay the builder's bill. So in these cases, if the subscriptions of the club were not sufficient to enable the committee to furnish the provisions,—if they were run out,—it appears to me that the committee ought to have called the club together, and asked for a further subscription, and have said, "It was not the intention of the club that we should make ourselves liable—the intention of the club was to supply us with money beforehand,"—that is what the committee ought to have done. On the whole, I am of opinion that the defendants are not liable.

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PARKE, B.—I am entirely of the same opinion with the Lord Chief Baron, and I must own, that since I have heard the report read, and made myself acquainted with the circumstances, and have had an opportunity of considering the rules of this club, which form its true constitution, I have not entertained a doubt as to the non-liability of the defendants.

This is an action brought against the defendant on a contract, and the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind in cases of this class; for on most questions of this kind the real ground of liability is very apt to be lost sight of. As the defendant did not enter into the contract personally, it is quite clear that the plaintiff cannot recover against the defendant, unless he shews that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf; and the question is in this case, whether there was sufficient evidence to go to the jury to satisfy them that the person who actually

expenses. The 19th rule, which is relied upon as giving the committee authority to bind the defendants, only provides that they shall manage the affairs of the club. Now I think it is impossible to come to any other conclusion on the true construction of these rules, than that all the committee was to do, was to manage the fund thus supplied; and if they chose to enter into contracts upon credit when they had not sufficient funds, that is their own affair. There is no evidence in the case to warrant any conclusion that a society of this nature should have gone on dealing upon credit: all the committee had to do was, either to pay ready money, or not to enter into any contract until they had money in hand; or if they chose to do so, it was mere matter of convenience, and they were not to suppose they were binding the members individually to pay, for they had the means of payment in their hands. I have no doubt that is the true construction to be put upon the written documents. There is no evidence to shew that the defendant had given authority to the committee to act as his agents, so as to render him liable on a contract of this kind; and it should be shewn affirmatively by the plaintiff, that he had assented to their trading in a different manner from that which is contemplated by the rules. The only thing given in evidence was an order to pay a sum of money on account, on behalf of the members of the club, to Mr. Flemyng, but the defendant is not proved to have sanctioned this; and even if he had, there is no proof that he knew at the time that the committee were not in funds when they entered into the contract. The committee might at any time, pursuant to their original authority, have entered into a contract for the purchase of wine, when they had money in the bankers' hands, and there is no proof they had not, at the time of the alleged contract, money in hand, or if they had not, that the defendant knew anything of it. The inference sought to be drawn rests altogether on the ground of the committee's not dealing in the

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way they ought to deal; but if that is to vary the authority given by the original rules, it ought to be shewn *affirmatively* that the defendant did know and sanction it. It seems to me, therefore, that the two cases of *Fleming v. Hector*, and *Adams v. O'Brien*, stand on the same footing, and that a nonsuit ought to be entered in both. With regard to the other case, the question in fact comes to the same point. It appears that Mr. Rippon was named on the committee, but it is not shewn that he ever acted as a committee-man, or sanctioned his being so named, and that ground of liability therefore falls to the ground. It appears also that he was a member before these regulations were published:—but the only piece of evidence in the case that seemed at all to affect him, was that on which the Chief Baron has observed, viz., that when applied to by the clerk of the plaintiff's attorney, Mr. Rippon said he knew he was a member of the club, and as such liable; but I think that imports nothing more than that he knew he was a member of the club, as he had paid his subscription for the second year as well as the first: and then as to his liability, it is nothing more than the expression of his opinion, first, of his being a member of the club, and secondly of his liability, in which he is wrong. Indeed, in the very same breath, he says he will defend any action that may be brought against him, and have the question settled. It seems to me, therefore, that the case of *Adams v. Rippon* differs in no respect from the others, and all the cases resolve themselves into questions of law as to the construction of these rules and regulations. I am of opinion, for the reasons I have given, that the defendants are not liable.

ALDERSON, B.—I am of the same opinion. This question turns simply on the authority which the parties who made the contracts had to pledge the credit of the defendants to the plaintiffs. Taking it that the committee have made the contract, and that they are by

the rules of the society authorized to manage the affairs of the club, it may follow from that that the defendants have given authority to the committee to discharge the contract out of the funds in their hands: but it is contended on the part of the committee that they had a right to pledge the personal credit of the members, and therefore to make these defendants liable. I think they have not. When I come to look at the rules of the club, which are to be the guide by which we are to act, and which constitute the only authority the committee had, I do not find anything to lead me to the conclusion that the authority of the committee extended to the right of pledging the personal liability of any of the members of it; on the contrary, I find the members of the club carefully provided a fund, which was to be collected before they became members of the club, and having collected that fund and provided it, the committee are to manage it. Then what is it the committee are to manage? Why, the fund so provided, and to manage the club upon those terms. If that be so, the committee are not authorized to pledge the credit of individual members; and if they do deal on credit, it is their own affair, done on the faith of the money in their hands, which would enable them to pay their accounts. It seems to me there is no pretence for saying, in this case of *Adams v. Rippon*, (which is the only one I have heard, and the only one I shall enter into on the present occasion), that the defendant is liable. With respect to the others, I agree in the general principles laid down by the rest of the Court, and I have no doubt the application of those principles is correct.

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GURNEY, B.—I entirely concur in opinion with the rest of the Court, though I was at first disposed to think the defendant was liable. That impression arose out of decisions which, upon examination, appear to have been founded in an erroneous application of the law on the subject of partnership. The discussion, however, which has

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taken place in this case, has convinced me that this is not the case of a partnership, but of principal and agent; and being a case of principal and agent, it is incumbent on the plaintiff to establish that there was an agency, and that from the members at large, to procure goods upon credit. I am now fully convinced, taking it on the regulations of the club, that there is not such an agency here. There is one fact established, namely, that immediate payment was expected from every member; and the committee could deal with those funds in providing all the necessities required for the purposes of the club; and if they were called upon to do more, they ought to have applied for further authority. I concur therefore in opinion with the rest of the Court, that in all the three cases judgment of nonsuit should be entered.

ALDERSON, B., then added, that *Bolland*, B., had intimated his concurrence in the opinions about to be delivered in these cases, before he left the Court.

Rules absolute.

REAY v. YOUNG.

A *distringas*, for the purpose of proceeding to outlawry, may issue after a writ of summons which has been continued by *alias* and *pluries*, sued out to save the Statute of Limitations.

CHILTON moved in this case for a *distringas* to ground proceedings to outlawry. A writ of summons had been issued on the 11th of May last, which had been regularly continued by writs of *alias* and *pluries*, for the purpose of preventing the operation of the Statute of Limitations, and which writs had been regularly returned and entered of record, pursuant to the 2 Will. 4, c. 39, s. 10. The officer of the Court doubted whether the plaintiff could have a *distringas* in continuation of the former writs, for the purpose of proceeding to outlawry, and whether he should be justified, without the sanction of the Court, in sealing a writ of *exigi facias*, under these circumstances, inasmuch as the writs had been issued to save the Statute of

Limitations, and not for the purpose of proceeding to outlawry. *Chilton*, in support of the application, produced an affidavit which stated the above facts, and also that the defendant was resident at Boulogne in France. He cited *Fraser v. Case (a)*, and referred to Tidd's Practice, Supplement, 51.

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PARKE, B.—I see no reason why a *distringas* may not issue in this case. The 10th section of the statute provides, that no writ, issued by authority of that act, shall be in force more than four calendar months, but every writ of summons and *capias* may be continued by alias and pluries, as the case may be; it then provides, that no first writ shall be available to prevent the operation of any statute of limitations, unless the defendant shall be arrested thereon, or served therewith, or proceedings to or towards outlawry shall be had thereupon, or unless such writs shall be returned and entered of record. Now, if you leave out the word "*capias*," then it will stand, that proceedings to or towards outlawry are to be had on the writ of summons. I therefore see no incongruity in issuing a *distringas* in continuation of the former writs.

ALDERSON, B.—The 3rd section provides for the issuing of a *distringas* for the purpose of proceeding to outlawry after any original writ of summons; and it says, that if the party shall not intend to proceed to outlawry, the Court or a Judge may order an appearance to be entered.

Motion granted.

(a) 2 M. & Scott, 720.

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EDWARDS, Administrator, v. GRACE.

A count for work done by the plaintiff as administrator may be joined with counts for goods sold and work done by the intestate, on promises to him.

ASSUMPSIT.—The declaration contained counts for goods sold and work and labour done by the intestate, and on an account stated with him, laying the promises to pay the intestate. It also contained a count in indebitatus assumpsit for work and labour by the plaintiff, *as administrator*, laying the promise to the plaintiff as administrator.

Special demurrer, assigning for cause, that a count on a cause of action accruing to the plaintiff as administrator since the death of the intestate, could not be joined with counts on promises to the intestate in his lifetime.

Thomas, in support of the demurrer. A count for work done by the administrator, on promises to him, cannot be joined with counts for goods sold and work done by the intestate, on promises to him. It is a general rule, that whenever the subject-matter of the action would, when recovered, be assets, the executor or administrator may sue in his representative character: *Cowell v. Watts* (a), *Ord v. Fenwick* (b). The sum claimed by the last count, being for work and labour done by the plaintiff after the death of the intestate, could not be assets, neither would it be liable to probate duty. [Lord *Abinger*, C. B.—Suppose this was work done in completing a contract of the intestate's, as for instance, in finishing a coat which he had undertaken to make, and commenced making, and had provided materials for completing it; the money, when recovered, would be assets. *Parke*, B.—The administrator may think it for the benefit of the estate to go on with the work the intestate had contracted for, and was bound to complete. If there is any possible case

(a) 6 East, 405.

(b) 3 East 108.

in which an executor can be bound to complete the contract of his testator, then the money, when recovered, would be assets. *Alderson, B.*—In order to sustain your argument, you must make out that an administrator can, in no case, complete a contract of his testator, and recover for it in his representative character. Lord *Abinger, C. B.*—An executor may not be compellable to perform the contract of his testator; but if a man makes a contract to do a specific thing, as to build a wall, and he dies before the wall is finished, his executors could not recover for the work until the wall is finished. *Parke, B.*—In *Ord v. Fenwick*, which was an action for money paid by the plaintiff as executrix, Lord *Ellenborough* expressly says,—“If we can suppose a case where the money must have been paid by the plaintiff as executrix, and for which she must entitle herself to recover as such, the judgment may be sustained.” Now, this may have been work done by workmen employed by the administrator in finishing a contract of the testator, and paid out of the assets. *Marshall v. Broadhurst (a)* is an express authority that an executor may recover for work and labour as executor.]

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Judgment for the plaintiff.

(a) 1 C. & J. 403.

BECKE, Assignee of WM. ASHTON, an Insolvent Debtor,
v. SMITH.

TROVER for certain cattle, goods, and chattels, the property of the said Wm Ashton. Pleas—1st, Not guilty; 2ndly, That the said Wm. Ashton was not possessed as of his own property of the cattle, goods, and

The 32nd section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, does not apply only to such assignments and

transfers as are made within three months before the commencement of the imprisonment, or during the continuance of such imprisonment, but extends to assignments made at any time, even a year previous to the imprisonment, if made with the view or intention of petitioning the Court for the insolvent's discharge.

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chattels in the declaration mentioned, modo et formâ; and issue thereon.

At the trial before *Bolland*, B., at the last assizes for the county of Northampton, it appeared that an action for money had and received had been brought against the insolvent by one Wright, which was tried at the Northampton Spring Assizes, 1834, and was undefended. It was proved also, that on the commission day of the assizes at which the above cause was to be tried, the insolvent gave a bill of sale of all his household furniture and effects to the present defendant, in satisfaction of a bonâ fide debt to the amount of 100*l.* The defendant sold the effects under the bill of sale for 57*l.* 18*s.* On the day the bill of sale was given, the insolvent ran away from Northampton, but returned in March, 1835, when he went to prison, and petitioned to be discharged under the Insolvent Debtors' Act, and was ultimately discharged accordingly, and the plaintiff was appointed his assignee. This action was brought to recover the value of the goods taken and sold under the bill of sale by the defendant, the plaintiff insisting that the bill of sale was fraudulent and void under the 32nd section of the 7th Geo. 4, c. 57, it being a voluntary conveyance, made with a view of petitioning for his discharge under the Insolvent Act. The learned Judge, however, was of opinion that the 32nd section applied to such assignments and transfers only as were made within three months before the commencement of the imprisonment, or during the continuance of the imprisonment, and that this bill of sale having been given more than a year before the imprisonment began, the act did not make it invalid. The plaintiff then went on to prove a case of fraud, independently of the provisions of the Insolvent Act, under the stat. of Eliz.; but on the case being submitted to the jury, they found that the transaction was not fraudulent, and gave a verdict for the defendant. *Humfrey*, on a former day in this term, obtained

a rule to shew cause why there should not be a new trial, *Exch. of Pleas, 1836.*
on the ground of misdirection.

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Adams, Serjt., and *Whateley*, shewed cause. It is submitted that the learned Judge was right in his direction to the jury. The question depends upon the construction to be put upon the 7 Geo. 4, c. 57, s. 32, which enacts, that if any prisoner, who shall file his petition for his discharge under the act, shall, *before or after* his imprisonment, being in insolvent circumstances, voluntarily convey his property to any creditor, every such conveyance shall be deemed, and is thereby declared, to be fraudulent, and void as against the provisional assignee; provided always, that no such conveyance shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, of petitioning the said Court for his discharge from custody under that act. Now, the meaning of that section is, that the assignment shall not be deemed fraudulent and void, unless it be made within three months before the party goes to prison; or, if he has previously gone to prison, then with the intention of petitioning for his discharge from custody. The intention of the act was to put a certain limit to the operation of that section, which is but reasonable. [*Alderson*, B.—Suppose there were pregnant evidence that three months and one day before he went to prison, an insolvent made a voluntary conveyance of his property, you would say it was not within the act, and the deed could not be impeached.] Certainly, that may be the consequence. The proviso is to be construed, *reddendo singula singulis*; the assignment is to be void, whatever his intention was at the time of making it, if he goes to prison within three months, but not otherwise; or if, being in prison, he makes the assignment with the view of petitioning for his discharge. One part of

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the proviso is intended to apply to the case of a party before he goes to prison, but who goes to prison within three months after the assignment; the other to the case of a party being in prison, who makes the assignment with a view to petition for his discharge. The case was therefore properly left to the jury.

Humfrey, Waddington, and White, in support of the rule. The case of *Wainwright v. Miles* (a), is a decision against the construction relied upon on the other side. There the sale of the insolvent's effects took place more than three months before the insolvent was arrested and went to prison, and the Court held, that it was a question for the jury whether the assignment was made with an intention of taking the benefit of the Insolvent Act. That question could not have arisen, unless the Court had thought that the 32nd section applied to a case like the present. The object and intention of the legislature was to make void all voluntary conveyances by persons in insolvent circumstances, provided they give a fraudulent preference to a particular creditor; but that it shall not be necessary to adduce any evidence of the fraud, if the insolvent goes to prison within three months, in which case it is to be deemed ipso facto fraudulent and void; if it is beyond the period of three months, then it must be shewn that it was made with the view or intention of petitioning for his discharge. The object of the legislature was to favour the distribution of the insolvent's effects equally amongst all his creditors. Then, if the construction put at the trial was not right, there ought to be a new trial, as it ought to have been left to the jury to say, whether the insolvent executed this deed with the view or intention of petitioning for his discharge under the Insolvent Act.

Cur. adv. vult.

(a) 3 M. & Scott, 211.

The judgment of the Court (a) was now delivered by

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PARKE, B.—The only question which remained for consideration, after the argument against the rule for a new trial in this case was, as to the true construction of the 32nd section of the 7 Geo. 4, c. 57. It occurred to my Brother *Bolland* on the trial, that the section applied to such assignments and transfers only as were made within three months before the commencement of the imprisonment, or during its continuance; and the assignment in question having been made more than a year before the insolvent went to prison, he thought that this section could not render it void. The plaintiff is entitled to a new trial, if that view of the subject was incorrect; and upon consideration, we all agree that it was.

It is a very useful rule (b), in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.

Let us adopt that rule in this case. The 32nd section enacts, "That if any prisoner, who shall file his or her petition for his or her discharge, under this act, shall, before or after his or her imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such con-

(a) *Parke, B., Bolland, B., Alderson, B., and Gurney, B.* *ton v. Loveland*, 1 Hudson & Brooke's Irish Reports, 648.

(b) *Per Burton, J., in Warbur-*

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veyance, assignment, transfer, charge, delivery, and making over, shall be deemed and is hereby declared to be fraudulent and void, as against the provisional or other assignee or assignees of such prisoner appointed under this act: provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his or her discharge from custody under this act."

By the first part of the clause, every voluntary conveyance to a creditor, by one who afterwards petitions for his discharge, made either before or after his imprisonment, whilst he is in insolvent circumstances, is avoided. Then comes the proviso, by way of qualification of the foregoing provision, which enacts, that no such conveyance shall be void, unless made within three months before the commencement of the imprisonment, *or*, with a view of petitioning the Court for his discharge. If *either* of these circumstances occurs, the voluntary conveyance by an insolvent is rendered null; if made within the three months it is void; if made *at any time*, with a view of petitioning the Court, it is void, for there is not a word expressly to confine the last alternative within any limit of time: and though, at first sight, the words, "with a view of petitioning for his discharge," might strike the reader as applying to persons *then* in custody, such is not necessarily their meaning. In reality, they are just as applicable to a person out of prison, as to one in prison. The construction contended for by the plaintiff is, therefore, according to the words of the clause; it is, besides, a very reasonable one. The effect is this. As voluntary preferences are usually given on the eve of the taking the benefit of the act, a time is fixed (three months) within which,

to prevent many questions, all voluntary conveyances to a creditor, made when the debtor is in insolvent circumstances, are avoided: *before* that time all such conveyances are avoided, where the actual intent to give a preference to a particular creditor is proved; and thus, the same effect is given to the insolvent, as to the bankrupt law, with reference to all anterior transactions.

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On the other hand, in order to give to the clause the meaning contended for on the part of the defendant, the grammatical construction must be altered, by introducing some words for the purpose of limiting the operation of the latter alternative: and the clause must be read as if it had been written thus, "Provided that no such assignment, *if made before imprisonment*, shall be void, unless made within three months before, &c., or *if made after*, unless made with a view or intention by the party conveying of petitioning the Court for his discharge." But if this were done, this incongruity would arise, that a stronger case would be required to avoid an assignment made *after* imprisonment than one made before. Besides, if this construction were adopted, every assignment made more than three months before the commencement of the imprisonment would be valid, however clear the intention to give a preference might be; and thus the whole object of the act might be defeated by a fraudulent insolvent, who, after conveying all his property to favoured creditors, would only have to go out of the way for three months, and then take the benefit of the act, after which no one assignment of his property could be questioned on the ground of fraudulent preference.

It appears to us, therefore, that the true construction of the clause is, that every voluntary assignment, made by one in insolvent circumstances, is void, *whenever made* with intention to take the benefit of the act. And this was the clear opinion of the Court of Common Pleas in the

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case of *Wainwright v. Miles (a)*, though the point was not fully argued. It is true, that upon the plaintiff's view of the case, in order to give full effect to the intention of the legislature, and to embrace *all* cases of voluntary transfers, both before and *after* imprisonment, the language of the clause (not very accurately drawn) must in one respect be understood, not according to its strict sense: and the words "within three months before the commencement of the imprisonment," which, strictly construed, exclude the time of imprisonment, must be read so as to include it, and taken to mean "within a period commencing three months before the imprisonment;" otherwise one of the inconveniences above pointed out, as necessarily resulting from the defendant's construction, would follow, namely, that a conveyance *after imprisonment*, though voluntary, would be protected, unless made with a view and intention of petitioning.

To obviate such an incongruity, common to both the constructions, according to the strict grammatical sense, the words must be thus slightly varied.

We are of opinion, for these reasons, that the rule must be made absolute for a new trial, when the question to be submitted to the jury, with reference to this section, will be, whether the assignment was made by the insolvent, when in insolvent circumstances, voluntarily, and with the view and intention by him of petitioning the Insolvent Court for his discharge from custody.

If all these circumstances *concur*, the plaintiff would be entitled to a verdict, but otherwise he would not.

Rule absolute.

(a) 3 Moore & Scott, 211.

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BAKER v. BROWN.

PETERSDORFF applied to the Court to increase the amount of the verdict in this case, from the sum of 1025*l.* to 1058*l.* It was an action on a mortgage deed for payment of the former sum, with interest; and at Nisi Prius, the cause being undefended, the plaintiff's counsel inadvertently took a verdict for the principal sum only, omitting to calculate the interest; and it was entered accordingly on the record, and on the Judge's notes. In a case in Godbolt's Reports (a), where, the plaintiff being entitled to treble damages, the verdict was taken for single damages only, the Court increased the amount accordingly. [*Alderson, B.*—There the Court only gave the finding of the jury its legal effect.]

In an undefended action on a mortgage deed, the plaintiff's counsel inadvertently took a verdict for the principal money only, omitting to include the interest. The Court refused to increase the verdict.

Per Curiam.—We can do nothing but grant a rule to set aside the verdict, if the plaintiff desires it; but it has been entered as it was taken in Court, and we cannot increase it in the absence of the other party.

Motion refused.

(a) *Baldwin & Gwine's case*, Godb. 245.

JONES v. PRITCHARD.

ASSUMPSIT for work and labour done by the plaintiff in repairing of ship, of which the defendant was one of the part owners. Plea—non assumpsit. The cause was tried before the under-sheriff of Carnarvon: when the defendant called one Wm. Hughes, the captain of the vessel, and a part owner, to prove that he, the defendant, was not a part owner in the vessel. It was objected that

In an action for work done to a vessel against one part owner, another part owner is a competent witness for the defendant, after a release.

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a partner owner was not a competent witness, upon which the defendant gave him a release, but the undersheriff still refused to receive his evidence; and the plaintiff recovered a verdict, with 13*l.* damages. *R. V. Richards*, on a former day in this term, moved for a rule to shew cause why the verdict should not be set aside, on the ground that the witness had been improperly rejected. He submitted that even if, as a joint contractor, the witness was incompetent, yet the release at all events made him competent. He cited *Goodacre v. Breame* (a), *Young v. Bairner* (b), *Simons v. Smith* (c), and *Wilson v. Hirst* (d). He also urged, secondly, that the only way in which he could be affected, would be by the judgment obtained against Pritchard, and that his name might have been indorsed on the record under the 3 & 4 Will. 4, c. 42, s. 26. The Court having granted a rule nisi,—

Jervis now shewed cause. It is quite clear that the witness would not be competent without a release: then the question is, is he competent with a release? In *Cheyne v. Koops* (e), Lord *Alvanley* expressed an opinion that a co-contractor could not be released. He said, "The partners were all bound in equity to contribute; and though, if an action at law was brought against the witness, he could plead the recovery in the present action, which would be a bar at law, yet if Koops, the defendant, was dead or insolvent, the present plaintiff would have a right, by a bill in equity, to compel all the partners to contribute; and the witness would of course be subjected to his share." In *Simons v. Smith*, Lord *Tenterden* expressly held, that one partner could not release another for the purpose of making him a competent witness. In *Young v. Bairner* (f)

(a) Peake's N. P. C. 174.

Man. 742.

(b) 1 Esp. 103.

(e) 4 Esp. 112.

(c) Ry. & M. 29.

(f) 1 Esp. 103.

(d) 4 B. & Ad. 760; 1 Nev. &

Lord *Kenyon* was of opinion, at *Nisi Prius*, that a release by a partner would not make his co-partner competent. Undoubtedly, on a rule having been obtained, and the case coming on to be argued, Lord *Kenyon* appeared to entertain a different opinion, but the case was not discussed. In *Wilson v. Hirst*, there were mutual releases, which may distinguish that case from the present. [*Parke, B.*—What interest can the witness have if the defendant releases him?] It is admitted that the defendant could not call upon him for contribution, either for damages or costs: but in the case of bankruptcy or insolvency, it might be doubtful whether the assignees would be bound. Then this was merely a release from the consequences of the action, and there was nothing for the release to operate upon, as the contract between the parties could not arise until after the judgment.

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R. V. Richards, in support of the rule. *Young v. Bairner* is a clear authority in favour of the defendant, and *Cheyne v. Koops* must now be considered as overruled. Here Hughes was not called to prove a joint liability, but that he was solely liable, and a party may always do that, or shew that the interest has been parted with: *Jennings v. Griffiths* (a), *Moody v. King* (b). [*Parke, B.*—If that is so, it puts an end to the question.] But, taking it any way, *Wilson v. Hirst* is a strong authority that the witness was competent after a release.

PARKE, B.—I have heard enough to say that the undersheriff will do well on another trial to admit the witness, even if he turns out to be a part owner with the defendant, as I cannot conceive what interest he can have after a release.

The rest of the Court concurred.

Rule absolute.

(a) *Ryan & M.* 42.

(b) 2 B. & Cr. 558.

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GOODKEE v. GOLDSMITH.

To a declaration in assumpsit for money had and received, the defendant pleaded, as to all except 3*l.* 5*s.*, non assumpsit; as to all except 3*l.* 5*s.*, a set-off; and as to 3*l.* 5*s.*, payment of that sum into Court. The plaintiff, by his replication, admitted the set-off, and replied that he would not further prosecute his suit, except as to the 3*l.* 5*s.*, and took that sum out of Court:—*Held*, that the defendant was entitled to his costs on the two first issues.

ASSUMPSIT for money had and received, and for money due on an account stated. Pleas—first, non assumpsit, except as to 3*l.* 5*s.* parcel, &c.; secondly, a set-off, except as to 3*l.* 5*s.*, parcel, &c.; thirdly, payment of 3*l.* 5*s.* into court. Replication,—protesting that the defendant did promise in manner and form as the plaintiff hath above thereof complained against him, nevertheless, for replication in this behalf as to the said second plea, the plaintiff admits that before and at the time of the commencement of the suit, he was and still is indebted to the defendant in a sum of money, equal to the damages sustained by him, the said plaintiff, by reason of the non-performance by the defendant of the promises in the declaration mentioned, except as to the said sum of 3*l.* 5*s.*, parcel, &c.; and he the plaintiff is ready and willing to set off and allow to the defendant the full amount of the said damages, and will not further prosecute the suit against the defendant, except as to the said sum of 3*l.* 5*s.*, parcel, &c. To the third plea, the plaintiff replied by accepting the money paid into court. The plaintiff, by his particulars, claimed 28*l.* 5*s.* for money received by the defendant for the plaintiff's use. The defendant claimed a set off for upwards of 25*l.* for money paid on account of the plaintiff. The Master having upon taxation allowed the plaintiff the whole costs, *Kelly* on a former day obtained a rule to shew cause why the Master should not review his taxation, and allow the defendant his costs upon the two first pleas.

Ogle now shewed cause. The Master was right in his taxation, inasmuch as the defendant was not entitled to any costs. The plaintiff was compelled to bring his action for the whole sum of 28*l.* 5*s.*; for if he had brought his

action for the sum of *3l. 5s.*, the amount really due, and the defendant had pleaded the set-off to the amount of *25l.*, it would have covered the amount for which the action was brought. The defendant ought not to have pleaded non assumpsit at all, but should have relied upon the other pleas only.

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Kelly, contra, was stopped by the Court.

PARKE, B.—The rule must be absolute. The replication amounts in effect to a nolle prosequi. If there has been a nolle prosequi to a count or part of a count, the costs follow, by the statute (a). The plaintiff has abandoned his cause of action on the general issue, and the set-off. He will be entitled to costs as to that part of the cause of action in respect of which money is paid into Court, but the defendant to the costs on the other issues.

The rest of the Court concurred.

Rule absolute.

(a) 3 & 4 Will. 4, c. 42, s. 33.

LEWIS v. JONES.

THIS was a rule under the Interpleader Act, which had been obtained on the application of the sheriff of Carmarthen-shire, calling upon the execution creditor and a claimant named Jones, to appear before the Court.

No one appearing for the execution creditor, *Chilton*, for the claimant Jones, now applied that the claim of the execution creditor might be barred, and the goods taken under the execution delivered to the claimant. He sub-

When, upon a rule obtained under the Interpleader Act, the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself

subsequent to the seizure, the Court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an issue against the sheriff for misconduct, provided it should turn out he had been guilty of any; and also, if there had been any misconduct in the execution creditor in giving directions to the sheriff, to bring an action against him.

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mitted that under the 1 Will. 4, c. 58, s. 6, the claimant ought not to be precluded from proceeding against the sheriff. The affidavits stated that the writ was indorsed "Levy 106*l.* 9*s.* 8*d.* ; the defendant resides at or occupies Plas Newydd," and that the goods were seized at that place; that the defendant had been a bankrupt a few years ago, and that the under-sheriff knew of the bankruptcy: that his son, the present claimant, had entered into possession of the farm in 1834, and had been in the sole occupation of the premises since that time. The sheriff therefore acted wrongfully in taking these goods, and the Court will not relieve him from his liability for the wrongful act. He cited *Bishop v. Hinxman* (a), and *Baynton v. Harvey* (b).

E. V. Williams for the sheriff.—The Court will bar both the execution creditor and the claimant from proceeding against the sheriff. This was a case of great suspicion as concerned the claimant, who was a young man scarcely of age. He had obtained possession of his father's farm and the effects under an auction, where the goods had been bought in, and this was therefore the very sort of case for which the act was passed to protect the sheriff. The sheriff received precise directions from the execution creditor as to the indorsement: he was directed to seize the goods at Plas Newydd. The claimant may bring an action against the execution creditor, but the sheriff ought not to be left liable to an action at the suit of the claimant. [*Parke, B.* The sheriff ought to be protected from the original seizure, but not from any subsequent misconduct. The better way would be, to direct an issue to try that.] The sheriff offered to remove the execution, if the claimant would indemnify him, which was refused.

Lord ABINGER, C. B.—By our interference the claimant receives the benefit of the immediate return of the

(a) 2 Dowl. P. C. 166.

(b) 3 Dowl. P. C. 344.

property, and the execution creditor is barred of his claim. If he has given any authority to the sheriff for taking these goods, he must be liable in an action at the suit of the claimant; and if the sheriff after the seizure has misconducted himself in any way, he is responsible to that extent. If we were to allow an action of trespass to be brought, the jury would give damages for the original taking of the goods. Therefore we think the best rule to pronounce, will be, first, to bar the execution creditor; secondly, to order that the goods be returned to the claimant. Then the claimant may be at liberty to commence an action against the sheriff in the form of an issue, to try whether the claimant has sustained any damages, and if so, to what amount, through the misconduct of the sheriff subsequent to the seizure; also, if there has been any misconduct in the execution creditor in giving directions to the sheriff to take these goods, the claimant may have an action against him.

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Rule accordingly.

CHANDLER *v.* BEZWARD.

AN order had been obtained for the trial of this cause before the sheriff of Worcestershire, and a writ of trial was drawn up, returnable on the 12th of August. On the 5th of July notice of trial was given for the 12th of August following. On the 9th of August the plaintiff gave notice of countermand, but the cause was subsequently tried on the 17th of August, when the plaintiff obtained a verdict, the defendant not attending the trial. *R. V. Richards*, on a former day, had obtained a rule to shew cause why the plaintiff should not pay to the defendant the costs of not proceeding to trial, and why the proceedings subsequently had should not be set aside, on the ground that the notice of countermand was given one day too late, and

Where notice of trial has been given, which is afterwards countermanded, it is not necessary to reseal the record, unless the alteration is made to a day after the return of the writ.

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also that the record had been altered, by the insertion of the latter day of trial, without having been resealed.

Humfrey shewed cause, and produced an affidavit, stating that the plaintiff had not proceeded to trial, in consequence of the defendant's insolvency, and of an arrangement being entered into that proceedings should be stayed, on the terms of each party paying his own costs. He contended that there was no irregularity in altering the day of trial.

PARKE, B.—The Master informs us that it is not necessary to reseat the record, unless the alteration is made to a day after the return of the writ.

R. V. Richards, in support of the rule, having shewn from the affidavits, that the return day of the writ of trial had been altered from the 12th to the 19th of August,

THE COURT made the rule absolute.

Rule absolute.

M'GAHEY, Vestry Clerk of the parish of St. Pancras,
Middlesex, v. ALSTON and SEWELL.

To an action brought by the vestry clerk of the parish of St. Pancras, under a local Act, the defendant pleaded that the plaintiff was not

vestry clerk:—*Held*, that evidence of his acting as vestry clerk was sufficient *prima facie* evidence of his appointment. *Held* also, that one of the directors of the vestry was a competent witness for the plaintiff.

A cheque, drawn on account of the parish, was delivered to A., who was then the paying clerk of the parish. It was shewn that the bankers of the parish, on the same day, paid a sum of that amount, and that their custom was to return the cancelled cheques to the paying clerk, and that they were deposited in an apartment in the workhouse. A. having gone out of office, application was made to his successor at that place, for inspection of the cheques. He handed to the witness several bundles, which he searched, without finding the cheque in question:—*Held*, a sufficient search to let in secondary evidence of its contents.

DEBT on bond, dated the 1st of January, 1834, given by the defendants to the directors of the poor of the parish of St. Pancras, and their successors, in the penal sum of 500*l*. Pleas—1st, that the plaintiff was not vestry clerk of the parish; 2ndly, that the defendant Alston

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had duly fulfilled the conditions of the bond. The replication took issue on these pleas. There had been a third special plea, to which there was a demurrer, and which, on argument in Easter Term last, was held to be bad (a). The cause was tried at the sittings at Westminster in Trinity Term last, before *Gurney, B.*, when the dispute was as to the defendant Alston's right to retain a certain sum of money for his salary as vestry clerk. It appeared that he had been appointed paying agent or clerk for the parish, a Mr. Scadding being at that time the vestry clerk, and that no money was ever paid without the order being countersigned by the vestry clerk. Scadding having resigned the situation of vestry clerk, the directors of the poor passed a resolution, that the defendant should be appointed temporary vestry clerk, which recommendation the vestry subsequently adopted, but they also came to a resolution that the salary should be reduced from 500*l.* to 300*l.* a-year. The plaintiff contended that the reduction was to date from the resignation of Scadding; but the defendant claimed the higher salary up to the time when that resolution was passed. Accordingly, he retained in his hands the sum of 34*l.* 5*s.*, which was according to the higher rate, entering it in his accounts as paid to himself for his salary. His accounts were submitted to a committee of the vestry, who examined them, and, as the defendants contended, assented to them. They were afterwards sent to the auditors, and one of them signed the accounts. Alston was, however, ultimately dismissed from the office of vestry clerk, and the vestry refused to ratify his accounts. For the purpose of proving the first issue, the plaintiff himself was called as a witness (b), and stated that he was the vestry clerk of the parish, and acted as such. It was objected that this was not admissible evidence

(a) See 1 M. & W. 386.

by s. 16 of the St. Pancras Vestry Act, 59 Geo. 3, c. xxxix.

(b) Made a competent witness

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in proof of the issue, and that the appointment ought to be proved; but the objection was overruled. The plaintiff then called a person named Bradley, one of the directors of the vestry, who had examined the accounts, to prove that he had not conclusively allowed them, but that the above item had been objected to. It was contended for the defendant, that he was not a competent witness; but the learned Judge overruled this objection also; and told the jury, that the question for them was, whether the defendant Alston had or had not retained to himself any part of the monies that he had received; and that he thought he was not warranted in retaining money in payment of his salary, after the rate of the former salary. The jury having found a verdict for the plaintiff,

Sir *W. W. Follett*, in the same term, moved for a new trial, on the ground that evidence had been improperly received, and also on the ground of misdirection. First, the issue being whether the plaintiff was vestry clerk, it was incumbent upon him to prove, by proper evidence, that he had been duly appointed to that office, as by producing the books containing the appointment by the vestry: it was not sufficient to prove merely that he had acted as vestry clerk. [*Parke, B.*—Why should not the acting in a character of that sort be sufficient evidence of his having been duly appointed? In actions against magistrates, constables, and the like, it is sufficient to prove that they acted as such.] Here his right to bring the action depends upon his being vestry clerk; unless he be legally invested with that office, the action must fail. Suppose he had brought an action for slander of him in his office, he must have proved his appointment: *Sellers v. Till* (a), *Collins v. Carnegie* (b). [*Parke, B.*—The plaintiff fills a public

(a) 4 B. & Cr. 655.

Nev. & Man. 703.

(b) 1 Ad. & Ell. 695; S. C. 3

character. In *Cannell v. Curtis* (a), Tindal, C. J., intimates a strong opinion that even in an action for a libel, it is only necessary for the plaintiff to prove that he acted in the character in relation to which the words are written. Here the action is not brought for the plaintiff's benefit, but merely in his name. I have always thought that where an action is brought by a public officer, it is sufficient to prove his acting in that capacity.] It is submitted that that is not so where his title is the foundation of the action. In the case of an action brought by an attorney, it is necessary to prove that he is an attorney on the roll. So in the case of assignees of a bankrupt. In *Cortis v. The Kent Water Works Company* (b), where the plaintiff was entitled to sue in the character of treasurer to certain commissioners, and the act directed that the commissioners, or the major part of them, assembled at any meeting, not being less than thirteen, might by writing under their hands, appoint a treasurer; it was held that an appointment, signed by a majority of seventeen commissioners, was valid, and that it need not be signed by thirteen. That point would not have arisen, if acting in the office alone were sufficient. When an act requires a written appointment, and directs it to be entered in the books, and makes the books evidence of the appointment, it is in all cases necessary to produce them to prove the appointment. [Bolland, B. In *Berryman v. Wise* (c), Buller, J., said, that in the case of all peace officers, justices of the peace, constables, &c., it was sufficient to prove that they acted in those characters, without producing their appointments.] Secondly, Bradley was not a competent witness, inasmuch as he was a party interested. The plaintiff was but the nominal representative of the vestry, of whom Bradley was one of the directors,

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(a) 2 Bing. N. C. 228; 2 Scott,
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(b) 7 B. & Cr. 314.
(c) 4 T. R. 366.

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and so in effect one of the plaintiffs: and although the statute removes his incompetency on the ground of interest as a rated inhabitant, yet if he be a party to the record, he is incompetent. [*Parke, B.*—He is not named on the record. What interest has he? This very point was decided by this Court in *Fletcher v. Greenwell* (a). The vestrymen have a public duty to discharge, but no private interest in the matter. Lord *Abinger, C. B.*—The witness has no personal or pecuniary interest in the cause; nor is he a party on the record. His situation is that of a mere creation of the legislature.] In *Whitmore v. Wilks* (b), where the trustees were empowered by act of parliament to sue in the name of their treasurer, in an action by them, Lord *Tenterden* expressed himself of opinion, on one of their body being called as a witness, that he was not competent. [*Parke, B.*—That case was cited in *Fletcher v. Greenwell*. This is all for the benefit of the public.] Then there was a misdirection; for the question was, not whether Alston was justified in retaining the amount of his salary as he had done, but whether he had rendered his accounts, and they had been ratified by the directors: the directors are the persons who are to pay the salary. [*Parke, B.*—They are only to pay legal salaries.] Suppose Alston had paid a salary, which was not a legal one, by their direction, would he, the mere paying agent, be liable? Surely not. The auditing of the accounts was final: but even if the question was, whether he was justified in retaining the money as he did, the evidence shews that he was warranted in so doing. By the appointment of the directors, he became entitled to

(a) 1 C. M. & R. 754, where it was held, that when a local Act empowers the directors and overseers of the poor of a parish to sue and be sued in the name of their clerk, in an action for goods

supplied to the directors, a person who was one of the directors at the time when the goods were supplied, is a competent witness for the defendant.

(b) 1 Moo. & M. 214, 220.

the salary which had been paid to his predecessor, and when the vestry adopted the resolution of the directors, they authorized him to claim that salary—at all events up to the time when they passed the resolution that it should be reduced.

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Platt, on behalf of the defendant Sewell, also moved for a new trial, on the ground that the accounts of Alston, which were given in evidence to prove the receipt of the monies for which Alston had not accounted, were not sufficient evidence to charge Sewell as the surety: citing *Smith v. Whittingham* (a), *Goss v. Watlington* (b), and *Middleton v. Melton* (c).

LORD ABINGER, C. B.—On the point raised by Mr. *Platt*, we think there is sufficient doubt to induce us to grant a rule to shew cause; but on the other points, we are of opinion that no rule ought to be granted.

PARKE, B.—I think that the first objection which has been taken is not a valid objection, and that proof of acting was sufficient. The plaintiff is a public parochial officer; and the rule is, that all public officers who are proved to have acted as such, are presumed to have been duly appointed to the office, until the contrary is shewn. It is quite immaterial that the action is brought in the name of the officer. In all actions against justices and constables, no more is requisite than proof of their acting in those characters. With respect to the second objection, that Bradley was not a competent witness, the case which has been referred to, of *Fletcher v. Greenwell*, is a distinct authority to shew that the witness was competent. Then the third question is, whether Alston was substantially entitled to retain the sum of 34*l.* 5*s.* for his salary. He

(a) 6 Carr. & Payne, 78.

(b) 3 Brod. & Bing. 132.

(c) 10 B. & Cr. 317; 5 Man. & Ry. 264.

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claimed it as having been allowed by the directors; but the directors had no power to settle the amount of the salary; that belonged to the vestry. But he further insists that it has been adopted and allowed by the vestry on the settlement of his accounts. It appears, however, that at the time when these accounts were produced, this item was objected to, and in fact it never was allowed. But even if it had, I should have felt much doubt whether such an officer could exonerate himself by a payment, which, at the time he made it, he knew to be illegal. What the defendant did was equivalent to payment to a third person, of money which he knew that person was not entitled to demand. On these points, therefore, I think there should be no rule.

In Michaelmas Term, cause was shewn against the rule obtained by *Platt*: but it appeared, on the reading of the report, that there was other evidence given, besides the accounts of Alston, to shew the receipt of the money by him. It was proved by M'Gahey, the plaintiff, that on a day stated a cheque was given to the defendant Alston, who was then the paying clerk, for 230*l.*; and one of the clerks in the house of the bankers with whom the vestry kept cash, proved that on the same day a cheque to that amount was paid, and that their custom was to return the cheques, when paid, to the paying clerk. The cancelled cheques were kept in a room in the workhouse, used by the paying clerk as an office for that purpose. Another witness proved, that after Alston's dismissal, he applied to the succeeding paying clerk for an inspection of the cheques he had in his office; the paying clerk handed him several bundles, and the witness looked through them, without finding the cheque in question, but looked at no other. The paying clerk was not called, and secondary evidence of the cheque was admitted. No notice to produce the cheque had been given to the defendant.

Sir *F. Pollock*, (*Peacock* with him), shewed cause.— *Exch. of Pleas*, 1836.
 The point on which the rule was granted does not arise, inasmuch as there was, independently of the accounts, distinct and substantive evidence of the payment, clearly sufficient to charge the surety, provided there was sufficient proof of search for the cheque to let in secondary evidence of its contents. No notice to produce it was necessary, because, after it was returned from the bankers, it never was in the *personal* possession of the defendant, but only deposited in his office with the other parish papers. It is a question of law for the Court what constitutes reasonable evidence of search.—He referred to *Bishop of Meath v. Marquis of Winchester* (a). [The Court here (b) called on *Platt* to shew that there was not reasonable evidence to satisfy the mind of the Judge that the cheque was lost; and *Alderson*, B., referred to *Rex v. Stourbridge* (c).]

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Platt, in support of the rule.—In that case, the parish chest, which had been searched, was the proper place of deposit for the missing instrument; and it could not be produced in Court. But here the paying clerk might have been called, to state whether there were or were not other cheques in his office, besides those which he produced to the witness. Suppose it were a deed in the hands of an attorney,—could it be said this was sufficient evidence of a search for it? [*Alderson*, B. referred to the judgment in *Gully v. Bishop of Exeter* (d).] There it appeared that the party searched all the deeds in the office; but here he

(a) 3 Bing. N. C. 196.

(b) The learned counsel had argued also that, under the circumstances of the case, the accounts rendered by the principal were evidence against the security, and referred to the judgment of Lord Tenterden in *Whitnash v.*

George, 8 B. & Cr. 560; but as the Court gave no opinion on this point, that part of the argument is omitted.

(c) 8 B. & Cr. 96; 2 Man. & R. 43.

(d) 4 Bing. 298.

Exch. of Pleas, 1836. merely looks through those which the officer produces.

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[*Alderson*, B.—In ordinary cases, you do not make a search as for stolen goods, but assume, until the contrary appears, that the attorney or officer produces all the documents referring to the subject.]

PARKE, B.—If there was sufficient evidence to charge *Alston* with the receipt of the 230*l.*, it was for him to discharge himself. A piece of paper is given to him, taken to the bankers, returned, and deposited in the proper place of deposit for parish documents. If there was a reasonable search there, where the cheque might be expected to be found, secondary evidence of its contents was admissible. I think there was such reasonable search, and that the evidence therefore was admissible; and being admitted, it clearly proved the receipt of the 230*l.* On the other point I give no opinion: the only difference between this case and the others which have been decided on the question as to the accounts of the principal being evidence against the surety, is, that here it was a contemporaneous entry; whether that makes any difference, I will not say.

ALDERSON, B.—The Court must be reasonably satisfied that due diligence has been used: it is not necessary to negative every possibility—it is enough to negative every reasonable probability—of anything being kept back. The evidence must be according to the circumstances of the case; here I am satisfied there was reasonable evidence to let in the secondary proof.

GURNEY, B. concurred.

Rule discharged.

Exch. of Pleas,
1836.

THOMAS, Executor, *v.* The Honourable — EDWARDS (a).

THIS was an action of assumpsit, brought by the plaintiff, as the executor of one Mary Thomas, deceased, an innkeeper at Haverfordwest, for refreshments supplied by her to voters during the contested election for the county of Pembroke in the year 1831. At the trial before *Patteson, J.*, at the Pembrokeshire Summer Assizes, 1835, it appeared that the defendant had acted as chairman of the committee of Mr. Greville, one of the candidates at the election in question, and it was proved that, on the day previous to the nomination day, a person named Miller had offered his services to the committee, to be applied in any way they thought most useful for the cause. On the following morning Miller attended a meeting of the partisans of Mr. Greville, at the house of a Mr. Harvey, the agent of Lord Kensington, the father of the defendant. On that occasion, Miller was informed that his services were to be used in the regulation of public houses to be opened for the voters of their party, and a list was given him of the names of the different public houses, and directions as to the terms on which the refreshments were to be supplied; and pursuant to these instructions, Miller opened the public houses, including the testatrix's, and arranged as to the items. Miller said he could not swear that the defendant was one of the gentlemen from whom he received these instructions, or that the defendant was present when they were given, but after they had been given, on the same morning, he saw the defendant, who said to him, "Miller, if you have any difficulty come to me." At a subsequent period of the election, a difficulty arose as to tickets which had been evaded, of which Miller told

In an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were in fact ordered through a third party, *M.*—*Held*, that the plaintiff was bound, in order to recover in the action, to prove that *M.* was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant, in so employing *M.*, was not acting as agent for any other person; or else that *M.* was a principal jointly with the defendant, or with the defendant and others: and that it would make no difference that the plaintiff, at the time, considered *M.* as authorized to contract on behalf of the candidate, if in fact he was not so authorized.

(a) This case was decided in Hilary Term, 1836, but was inadvertently omitted in its proper place.

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the defendant, who said, "Well, we must stand shot for the day." It was proved by Mr. Harvey, who acted as clerk to the committee, that, whenever matters of finance were discussed in the committee, Mr. Greville was requested to withdraw. The learned Judge told the jury that, even if they thought that the defendant was one of those who authorized Miller to open the houses, yet it did not seem to him that he would be personally liable, unless they were satisfied that the defendant meant to pledge his personal responsibility. The jury having, under this direction, found a verdict for the defendant, *E. V. Williams*, in Michaelmas Term following, obtained a rule to shew cause why there should not be a new trial, on the ground that this amounted to a misdirection on the part of the learned Judge.

Against this rule *Chilton* shewed cause, and *E. V. Williams* and *James* were heard in support of the rule. The Court took time to consider, in order that they might have an opportunity of consulting the learned Judge as to the mode in which he had left the question to the jury, of which there appeared to be some doubt. The judgment of the Court was afterwards delivered by—

PARKE, B. (After stating the nature of the action, and the facts, his Lordship proceeded):—We have spoken to the learned Judge who tried the cause, but he has no distinct recollection as to the way in which he left the question to the jury. Under these circumstances, the Court think it better that the case should go down again to a new trial; and to prevent any misapprehension, they have put into writing the questions which they think ought to be submitted to the jury. The plaintiff must prove that there was an express contract, or a contract implied, between the defendant and his testatrix, to pay for the meat and drink supplied by her to the voters. The bur-

then of proof is on the plaintiff. The first question will be, whether *any contract* at all was entered into by any one with the plaintiff's testatrix? If she supplied the meat and drink to the voters, on a mere speculation that the candidate, or some other person interested in the election, would, as a matter of honour, pay for them, no contract was thereby created with any one; but if she supplied them by the order of another, looking to be paid for them as *a matter of right*, a contract would be implied. On the supposition that a contract was entered into, the next question is, with whom was that contract made? The voters were certainly not contracting parties. Miller, the person who gave the order, was, *prima facie*, the contracting party with the plaintiff's testatrix; but if the plaintiff shews that Miller was acting as the agent of another in giving that order, the principal is the person ordering, in point of law, and therefore the contracting party. If, then, it is proved that Miller was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant himself was not acting, in so employing Miller, as agent for any one else, then the defendant is the principal, and is liable; whether he intended or not to pledge his personal responsibility, he is responsible, if he be a principal, and he is so, unless he himself be agent for another. The same consequence will follow, if Miller was not a mere agent, but acted jointly with the defendant, or the defendant and others, in giving the order. If it should appear that the testatrix considered Miller as acting on behalf of the candidate, and trusted him by supplying goods to the voters, on the supposition that he was authorized to contract on his behalf, it would make no difference, although the contract with the candidate would have been illegal: for, on proof by the plaintiff that Miller was not so authorized, the plaintiff would establish that the contract was not with the candidate, though the testatrix supposed it to be;

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and there would, therefore, be no illegality in the contract *actually made*; and no policy of the law would prevent an action being brought upon it. If, indeed, the meat and drink were supplied by the testatrix, *with a view to induce the electors* to vote for a particular candidate, the contract actually made would be illegal; but of this there was no sufficient evidence in this case; and if there had been, such a defence would not have been admissible under the plea of non assumpsit, since the new rules. In addition to the cases of *Piel v. Hodgson*, and *Railton v. Hodgson* (*a*), cited on the argument, as to the liability of one who was the real principal, though he was believed to be agent for another, I may mention a dictum of Lord *Holt*, (*Holt*, 309), who says, if "A. employs B. to work for C., without warrant from C., A. is liable to pay for it."

Rule absolute.

(*a*) Stated in the argument in *Paterson v. Gandasequi*, 15 East, 67.

END OF MICHAELMAS TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

RULE OF COURT,

EXCHEQUER OF PLEAS, HILARY TERM, 7 WILL. IV.

“ IT is ordered, that from and after the last day of the present Term, no rule shall be drawn up for setting aside an attachment, regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail-bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits; or if made on the part of the sheriff, or bail, or any officer of the sheriff, be grounded upon an affidavit shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his and their own indemnity only, and without collusion with the original defendant. (a) *Exch. of Pleas,*
1837.

“ ABINGER.

“ E. H. ALDERSON.

“ J. PARKE.

“ J. GURNEY.”

“ W. BOLLAND. ..

(a) This rule assimilates the practice of the Court of Exchequer in this respect to that of the Court of King's Bench: see

Exch. of Pleas,
1837.

WILLIAMS v. EVANS.

The Court refused to grant a rule for a new trial in a case before the sheriff, where the damages were under 5*l.*, although the evidence appeared to shew that it was one of several actions brought by different plaintiffs against the same defendant for aliquot parts of a sum of money exceeding 5*l.*, which ought to have been sued for in one joint action by all those plaintiffs, being due under one entire contract by the defendant with them all.

THIS was an action for work and labour, and wages due to the plaintiff as a boatman, tried before the under-sheriff of Carnarvonshire, when the plaintiff had a verdict for 4*l.* 7*s.* 6*d.*

Jervis now moved for a new trial, on affidavits stating that the plaintiff was one of a boat's crew of seven men hired by the defendant, who was the owner of a steamer plying from Carnarvon to Liverpool, at wages of 4*l.* a week for the whole seven, which they apportioned among themselves by the payment of 11*s.* 6*d.* a week each to six of them, and 11*s.* a week to the seventh, each receiving the latter sum in turn; that five of the seven had brought actions against the defendant for their wages, one of which had been tried before the present, and a verdict found for the defendant; the four other plaintiffs having, on their cross-examination as witnesses for that plaintiff, admitted that it was an employment of the whole crew jointly. He submitted, that as the other actions pending were in fact identical with this, it should be considered in the light of a single action for the wages of all the parties, and therefore the rule which the Court had laid down, not to grant a new trial before the sheriff where the verdict was under 5*l.*, ought not to conclude this defendant.

But, *per Curiam*.—The rule is inflexible: in the other actions you may take out a summons before a Judge to rescind the order to try before the sheriff.

Rule refused.

R. (K. B.), M. 59 G. 3; 2 B. & Ald. 240. There had been contradictory decisions, rendering it doubtful whether that rule was adopted into the practice of this

Court: see *Bourne v. Walker*, 2 C. & M. 338; *R. v. Sheriff of Surrey*, 1 C. M. & R. 581; *Call v. Thelwell*, ib. 780.

Esch. of Pleas,
1837.

EDWARDS v. BAGSTER.

THIS was an action for work and labour, in cleaning out the cesspools of certain houses belonging to the defendant, pursuant to the following agreement:—

“ Mrs. Edwards agrees with Mr. Bagster to cleanse the cesspools belonging to the thirteen houses in Shap-street, well and thoroughly, in a complete manner, for 8*l.* 2*s.* Mrs. E. to repair any damage that may be done by those she employs, and Mr. Hughes's rent-balance to be deducted from the said sum.

“ 4th October, 1836.

ANN EDWARDS.”

The defendant pleaded, first, non assumpsit; secondly, a tender of 5*l.* 4*s.*, on which issues were joined. At the trial before *Arabin*, Serjt., at the Sheriff's Court, in London, it appeared that the Mr. Hughes mentioned in the agreement was the plaintiff's son-in-law, and was a tenant to the defendant of one of the thirteen houses, at the rent of 6*s.* per week. The agreement was signed in the middle of one of the weeks of his tenancy, and at that time the amount due from him for rent was 2*l.*; but when the work was completed, another week's rent had become due. It appeared also that the plaintiff cleansed out twelve only of the thirteen cesspools. It was objected for the defendant, first, that Hughes's “rent-balance” ought to be calculated as it stood at the time when the work was done, and the money became payable, in which case enough had been tendered to cover the rest of the demand; and secondly, that the plaintiff was not entitled to recover any thing until the whole work was done pursuant to the agreement. The learned Serjeant overruled the latter objection; and with regard to the former, he was of opinion that, on the proper construction of the agreement, the rent-balance was to be taken to be the balance due when the agreement

Assumpsit for work done under the following agreement:—“ Mrs. E. agrees with Mr. B. to cleanse the cesspools to the 13 houses in S. street for 8*l.* 2*s.*; Mr. H.'s rent balance to be deducted from the said sum.” H. was a weekly tenant to the defendant of one of the houses. The agreement was signed in the middle of one of the weeks of his tenancy. At that time 2*l.* was due from him for rent; but when the work was completed, another week's rent had become due. The Judge, at the trial, having expressed an opinion that the *rent-balance* meant the amount due when the agreement was signed, and the verdict having been found accordingly, the Court refused a new trial.

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was signed; and under his direction a verdict was found for the plaintiff for 6*s.* on the first issue, and for the defendant (the tender having been proved) on the second, leave being reserved to the defendant to move to enter a verdict for him on the first issue also.

Addison now moved to enter a verdict accordingly, or for a new trial. It did not appear that any balance was struck in respect of the rent when the agreement was signed, so as that the term "rent-balance" could be applied to that time. The ambiguity on the face of the agreement must be taken most strongly against the party signing it. It must have been known to both parties that the rent was payable weekly, and that the week was then running. [*Parke, B.*—If, from the nature of the work, it must have been contemplated that it would be done *within* the week, the parties must have meant the existing rent-balance.] Secondly, the plaintiff was not entitled to recover any thing until the whole work was done according to the contract, this being an agreement for an entire sum for the whole thirteen houses; *Sinclair v. Bowles* (a); unless the objection be held to be removed by the tender.

PARKE, B.—There is certainly considerable difficulty in understanding the meaning of this agreement; but, on the whole, I think the learned Judge was right, on the ground of the use of the term *balance*, which rather means to refer to the existing state of things at the time of the agreement. There is undoubtedly considerable obscurity about it; therefore I think you are not entitled to a rule. As to the other objection, it is removed by the plea of tender.

Rule refused.

(a) 9 B. & Cr. 92; 4 Man. & Ry. 1.

Each. of Pleas,
1837.

POOLE v. TUMBRIDGE.

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for 16*l.* 0*s.* 4½*d.* Plea—that after the making of the promise in the declaration mentioned, and *after the bill of exchange became due and payable*, and before the commencement of the suit, to wit, on &c., the defendant was ready and willing, and then tendered and offered to pay to the plaintiff the sum of 16*l.* 0*s.* 6*d.*, being the amount of the said bill, together with interest for the same from the day when the said bill became due to the day of the tender of the said sum, to receive which of the defendant the plaintiff then wholly refused; and the defendant further saith, that he hath always, according to his said promise, from the time when the said bill of exchange became due and payable, been ready and willing, and still is ready and willing, to pay to the plaintiff the amount of the said bill of exchange, with interest aforesaid; and the defendant now brings into Court the sum of 16*l.* 0*s.* 6*d.* ready to be paid to the plaintiff if he will accept the same. Demurrer, assigning for cause that a tender after the day of payment cannot be pleaded to an action against the acceptor of a bill of exchange.

A plea, by the acceptor of a bill of exchange, that, *after the bill became due*, and before the commencement of the suit, he tendered to the plaintiff the amount of the bill, with interest from the day it became due, and that he hath always, *from the time when the bill became due*, been ready to pay the plaintiff the amount, with interest aforesaid:—*Held* bad on special demurrer.

Humfrey, in support of the demurrer.—*Hume v. Peploe* (a) is a decisive authority that this plea is bad. Indeed, the plea in that case had an averment which is omitted here, namely, that the sum tendered was the whole money then due to the plaintiff in respect of the bill.

The Court then called on

R. V. Richards to support the plea.—It must be productive of great inconvenience and hardship if the holder

(a) 8 East, 167.

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is held entitled to recover against the acceptor, notwithstanding a tender of the amount of the bill and interest after the day of payment. The holder may proceed against the acceptor without any application to him for payment; the acceptor may not know where to find the holder when the bill falls due, and if he cannot relieve himself by a subsequent tender, he is placed in a situation of much difficulty and hardship. *Hume v. Peploe* is distinguishable; there the allegation in the plea was only that the defendant was always ready to pay *from the time of the tender*, not as, in this case, from the time when the bill became payable: there was therefore no allegation of *touts temps prist*, which was expressly decided to be necessary in a plea of tender in *Giles v. Hartis (a)*, and the decision proceeded on that ground. In *Johnson v. Clay (b)*, in covenant for rent, a tender of the rent after it became due, and pending a previous action of debt for the same rent, was held good. There is in such case the same strict liability to pay on a particular day as in this. In that case *Burrough, J.*, says, that a tender always admits the cause of action, and only goes in bar of damages.

Humfrey, in reply.—*Johnson v. Clay* is not law, if the report be correct in stating that the Court laid it down that a tender admits a breach of the contract. On the contrary, it is a denial of any cause of action, on the ground that the defendant, so far as *he* could, has performed the contract.

Lord ABINGER, C. B.—I am of opinion that this plea is bad. If the question be merely whether the acceptor can plead a tender after the day of payment, it is bad on the authority of *Hume v. Peploe*. I will not say that if this case arose—that the acceptor went on the day the bill

(a) 1 Lord Raym. 254.

(b) 7 Taunt. 486.

became due to the house of the holder, for the purpose of paying it, and could not find him, but on a subsequent day, when he found him, tendered him the money—I am not prepared to say that in such a case the rules of law ought to be pressed so far as to render the party liable to an action the next day after the bill becomes due, and not to allow him to plead that tender, by which means the proceedings of a court of law are made nothing else but machinery to increase costs. But it is consistent with the present plea that the defendant knew where the holder lived, but did not take the pains to tender him the money on the day it became payable. If he knows where the holder is to be found, he clearly ought to go and pay the debt. Even, therefore, if *Hume v. Peploe* did not apply, the plea does not disclose a sufficient defence.

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PARKE, B.—I am of the same opinion, and have no doubt this plea is bad. The declaration states the contract of the defendant to be, to pay the amount of the bill on the day it became due, and that promise is admitted by the plea. It is clearly settled that an indorsee has a right of action against the acceptor by the act of indorsement, without giving him any notice; when a party accepts a negotiable bill, he binds himself to pay the amount, without notice, to whomsoever may happen to be the holder, and on the precise day when it becomes due; if he places himself in a situation of hardship from the difficulty of finding out the holder, it is his own fault. It is also clearly settled, that the meaning of a plea of tender is, that the defendant was always ready to perform his engagement according to the nature of it, and did perform it so far as he was able, the other party refusing to receive the money. *Hume v. Peploe* is a decisive authority that the plea must state, not only that the defendant was ready to pay on the day of payment, but that he tendered on that day. This plea does not so state, and is therefore bad. As to the

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case of *Johnson v. Clay*, there must be some inaccuracy in the report, or on the part of the learned Judges, in their description of the plea of tender. Nothing can discharge a covenant to pay on a certain day but actual payment or tender on that day, although, if the party afterwards chooses to receive the money, that may be pleaded by way of accord and satisfaction. The Court seem also to have considered a *subsequent* demand and refusal necessary to defeat a tender, whereas a demand and refusal before or after the tender equally render it bad, on the principle that they shew that the party was not *always* ready to pay.

BOLLAND, B., concurred.

Judgment for the plaintiff.

LEWIS v. KERR.

The privilege of an attorney defendant to be sued in his own Court, is not taken away by the Uniformity of Process Act, 2 Will. 4, c. 39.

ASSUMPSIT by indorsee against drawer of a bill of exchange. Plea—that before and at the commencement of the suit, the defendant was, and hath hitherto been, and still is, one of the attorneys of the Court of our Lord the King, before the King himself, and during all the time aforesaid, hath prosecuted and defended, and still doth prosecute and defend, divers suits and pleas in the said Court, for divers subjects of our said Lord the King, as their attorney: and that he, and all the other attorneys of the said Court, ought, by ancient and laudable custom of such Court, from time immemorial used and approved of according to the laws and customs of this realm, and the liberties and privileges of the said Court, to be free and exempt from being compelled against their will, and have not at any time been used or accustomed to be compelled to answer any plea or plaint in any actions personal, (pleas

of freehold, felony, and appeal only excepted), before any justice or minister of our Lord the King, or any Judge whatsoever, except before the Justices of our said Lord the King, before the King himself: and that he is not, nor ever was an attorney, minister, or officer of the said Court here. Verification.—Demurrer and joinder:—the ground of demurrer stated in the margin being, that, though the defendant be an attorney of the Court of King's Bench, yet he is liable to be sued by writ of summons in the Court of Exchequer, of which he is not an attorney or officer.

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Platt, in support of the demurrer.—This plea differs from the old form of pleading an attorney's privilege, in not stating that the custom is to be sued in his own Court *by bill exhibited*. And the proceeding by bill being abolished by the Uniformity of Process Act, 2 Will. 4, c. 39, the custom is also at an end, and the privilege is gone with it. The custom was to be sued in the attorney's own Court *by a particular process*; and the rule being that when a custom is pleaded, the whole of it must be taken together, and an essential part of this being abrogated, the whole privilege has consequently ceased. The object of the statute was to place attorneys defendants on the same footing with the rest of the king's subjects. *Wright v. Skinner* (a).

Barstow, contra, was stopped by the Court.

LORD ABINGER, C. B.—I think there is nothing in the argument. Suppose the plea had set forth the ancient and laudable custom of being sued *by bill*, and stated that by the act of parliament the writ of summons was substituted for the proceeding by bill; the case would then have admitted of no doubt whatever. It was not the inten-

(a) 1 M. & W. 144.

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tion of the act of parliament to repeal, by a sidewind, any ancient privilege; for instance, it does not take away the privilege of Parliament: it would be very extraordinary if it did, without express words. The object was only to give, in lieu of the ancient process, a new mode of proceeding by summons.

PARKE, B.—I entirely concur. The effect of the act was merely to substitute the writ of summons for the bill, leaving the privilege of an attorney exactly the same as before.

The other Barons concurred.

Judgment for the defendant (a).

(a) See *Dyer v. Levy*, 4 Dowl. P. C. 630; *Davidson v. Chilman*, 1 Bing. N. C. 297; 1 Scott, 117.

CHARRINGTON v. MEATHERINGAM and Another.

By the 5 & 6 Will. 4, c. 50, the 13 Geo. 3, c. 78, which gave treble costs to parties sued for anything done in pursuance of the act, on a nonsuit, was repealed, the new act giving, in such case, costs only as between attorney and client. A plaintiff, who sued parish officers for an act done under the 13 Geo. 3, c. 78, became nonsuit at a trial which took place before the 5 & 6 Will. 4, c. 50, came into operation, but judgment was not signed till after:—*Held*, that the defendants were not entitled to treble costs.

IN this case, [reported ante, p. 142], it having been discovered, after the former rule was made absolute, that the 5 & 6 Will. 4, c. 50, which repealed the 13 Geo. 3, c. 78, did not come into operation until some days after the trial of the cause, viz. on the 20th of March, 1836, *N. Clarke* obtained a rule nisi to rescind the former rule, and to review the taxation, on the ground that the right to treble costs became vested by the nonsuit, although the judgment was not signed until after the repeal of the act by which they were given.

Miller and *Hurlstone* shewed cause.—The question turns on the construction to be put upon the terms of the 13

Miller and *Hurlstone* shewed cause.—The question turns on the construction to be put upon the terms of the 13

Geo. 3, c. 78, s. 81, which provides that actions for acts done in pursuance of the act shall be commenced within three calendar months, that the defendant may plead the general issue, and give that act and the special matter in evidence, and that if the plaintiff shall become nonsuit, the defendant "shall and may *recover* treble costs." The costs cannot be said to be *recovered* but by the judgment. The trial at nisi prius is for the purpose of informing the Court in banc on the facts, in order that the Court may afterwards, upon the postea, give judgment on those facts according to the existing law. Here it appears on the postea that the plaintiff did not appear to prosecute his suit; on that entry the Court would have to give such judgment as was warranted by the then existing law. The plaintiff's default is a mere *fact*, which being recorded, and returned into this Court, the Court gives judgment for the defendant to recover accordingly. The form of an entry of judgment for treble costs under a statute, as given by Mr. Tidd (*a*), is, "Therefore, according to the form of the statute, &c., it is further considered by the same Court here that the said C. D. *do recover* against the said A. B. the sum of—£, for his treble costs of suit," &c. Suppose the plaintiff had died after verdict and before judgment; it must still be contended on the other side that he would be entitled to his treble costs. *Miller's case* (*b*) is strongly in point to shew the effect of a repeal on proceedings begun under the repealed act. There it was held that an insolvent debtor, who had signed and sworn to his schedule under the act of 1 Geo. 3, nothing remaining to be done but his discharge, could not be discharged after the repeal of that act by the statute of the 2 Geo. 3. That case meets the argument that the defendants acquired their right to the treble costs by the non-

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(a) Tidd's Forms, 391 (6th ed.).

(b) 1 W. Bl. 451.

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suit. In *R. v. Mackenzie* (a), it was held, that where an act of parliament, from its passing, repealed a former act which ousted clergy from a certain offence, and imposed a new punishment on the offence from and after its passing, an offence committed before the passing of the new act, but not tried till after, could not be dealt with under either of the statutes. If the doctrine of relation were applicable, it would have applied to the several cases in which acts of bankruptcy, or tradings, anterior to the time when the Bankrupt Act, 6 Geo. 4, c. 16, took effect, have been held not to support commissions issued after that time. *Maggs v. Hunt* (b), *Surtees v. Ellison* (c), *Phillips v. Hopwood* (d), *Worth v. Budd* (e). In several of those cases the principle is laid down, that when an act of parliament is repealed, it must be considered, except as to transactions past and closed, as if it had never existed.

N. Clarke, in support of the rule.—The defendants are not driven to contend, that these costs are a *debt* from the time of the nonsuit, (which is the question in cases of bankruptcy), but only that they have, by the nonsuit, an inchoate right to them, which is to be perfected by the judgment. Public officers, to whom a statute gives a protection for acts done in pursuance of it, and on the faith of which they do those acts, are not to be deprived of that protection by the simple repeal of the statute. Suppose an action were now brought against a party for an act done during the existence and in pursuance of this statute; could he not plead the general issue, and give the act in evidence? If not, there would be no security for public officers; they cannot anticipate that the act will be repealed, and the protection taken away. The

(a) Russ. & Ry. C. C. 429.

(d) 10 B. & Cr. 39; 5 M. & Ry.

(b) 4 Bing. 212; 12 Moo. 357.

15.

(c) 9 B. & Cr. 750; 4 Man. &

(e) 2 B. & Ad. 172.

R. 586.

cases cited on the other side are not applicable. *R. v. Esch. of Pleas, 1837.* *Mackenzie* was not the case of a statute giving a protection, but imposing a punishment; and would be an authority, if at all, that the whole proceedings were a nullity. *Charrington v. Meatheringham.* *Miller's case* is equally inapplicable; there was there no vested right or privilege. The absence of any provision in this and other similar repealing acts, for the protection of acts done under the repealed acts, is strong to shew that the legislature considered them sufficiently provided for under the old acts. Thus, the Turnpike Act, 3 Geo. 4, c. 126, which repealed the former acts, contained a clause (s. 47), exactly similar in terms to that now in question, applying only to actions for acts done in pursuance of that act, but having no reference to acts previously done. The same is the case in the Weights and Measures' Act, 5 & 6 Will. 4, c. 68, s. 29, and the new Highway Act, 5 & 6 Will. 4, c. 50, s. 109. The 7 J. 1, c. 5, which gave justices and other officers, sued for any act done by virtue of their office, double costs in case of nonsuit or verdict for the defendant, continued for seven years only, but was afterwards renewed by the 21 J. 1, c. 12, which, however, contained no provision for continuing the protection as to acts previously done. In that case, the legislature must have seen the necessity of continuing the protection by express words, unless it continued without them; it must, therefore, have been considered that a protection once vested survived notwithstanding the repeal. So, before the 24 Geo. 2, c. 44, a constable executing a justice's warrant was liable for any defect of jurisdiction in the justice. That statute provided that he should not be liable, unless there were a demand of perusal and copy of the warrant, and a refusal to comply with such demand; but there is no clause for the protection of by-gone acts, notwithstanding its repeal: would a constable then, after the repeal of that act, be without protection for an act done during its continuance?

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It appears a strange anomaly to say that the defendants are entitled to the nonsuit, but not to its consequences. [Parke, B.—Are there not some cases on the right of a party to prove for the costs of a nonsuit, when the plaintiff subsequently becomes bankrupt, which apply to this case?] The earlier cases were in favour of the right of proof in such circumstances; *Hurst v. Mead* (a); but the later authorities have been against it; *Ex parte Charles* (b), *Walker v. Barnes* (c), *Scott v. Ambrose* (d), *Birè v. Moreau* (e).

Cur. adv. vult.

The judgment of the Court was delivered on a subsequent day by

LORD ABINGER, C. B.—The Court, upon consideration, are of opinion that they have no power to award the treble costs in this case. It appears to us, that those costs are in the nature of a *penalty*; and although it may be true that the party may retain his right to the *protection* afforded him by the repealed statute, it does not follow the same principle can be extended to a penalty. The statutes which give costs on a nonsuit (f), require judgment *of the term* to be given. In this case, the trial took place before the act of the 3 Geo. 3, c. 78, was repealed, and therefore the defendant was clearly entitled to all the protection which the law afforded him at that time. It is not necessary to give any opinion as to what would have been the effect of a repeal of the statute before the trial. The rule must be discharged.

Rule discharged.

(a) 5 T. R. 365.

(b) 14 East, 197.

(c) 5 Taunt. 778.

(d) 3 M. & Sel. 326.

(e) 4 Bing. 57; 12 Moo. 226.

(f) 23 Hen. 8, c. 15; 4 Jac. 1,
c. 3.

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HARDING v. STOKES.

IN this case, (reported ante, vol. 1, p. 354), the demurrer having been withdrawn by leave of the Court, the defendant pleaded not guilty, and the cause was tried before *Alderson*, B., at the last Somersetshire Assizes, when the evidence was to the following effect:—That one Wakefield, a party entitled to vote at the election of councillors for the borough of Bristol, under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, having promised his vote in favour of certain candidates, the defendant came to him, and told him, that if he would vote for certain other candidates, he would give him employment in hauling stones at certain weekly wages. Wakefield answered, that it was a good offer, but that the difficulty was how he should get off his promise; that he would consider of it, and would see the defendant again the next Friday. No further communication, however, took place between the parties, and Wakefield eventually voted for the candidates to whom he had originally promised his vote. On this evidence, it was objected for the defendant, that it did not prove a *corrupting* of the voter, as charged in the declaration, but a mere *offering to corrupt*, which, by the 5 & 6 Will. 4, c. 76, s. 54, was a distinct offence. The learned Judge inclined to that opinion, but declined, in the first instance, to nonsuit, and left the case to the jury on the credit of the witnesses. The jury, after many hours' deliberation, being unable to agree, the learned Judge then nonsuited the plaintiff, in order that, if the cause should come down again for trial, the question of law might be previously determined by the Court.

Under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 54, the offence of *corrupting* a voter is complete where the bribe is offered and accepted, and the voter promises to vote in pursuance of the corrupt contract, although he may break his promise, or may never have intended to perform it; but where a bribe is offered, but not accepted, the offence is that of *offering to corrupt*: and it is for the jury to say whether there was a complete agreement or not.

In Michaelmas Term, *Erle* obtained a rule nisi for a new trial, against which

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Butt now shewed cause.—The latter clause of the 5 & 6 Will. 4, c. 76, s. 54, provides against three distinct offences:—First, the procuring a party to give, or forbear to give, his vote; secondly, the *corrupting* him to do so; and thirdly, the *offering so to corrupt* him. This last is a new offence, not to be found in the old Bribery Act, 2 Geo. 2, c. 24. If the latter words were not in the act, it may be that the Court would hold that an offer to corrupt was evidence of an actual corrupting within the meaning of the old act; but here the legislature has made them distinct offences. *Corrupting*, undoubtedly, does not necessarily imply that the voter shall give or forbear to give his vote accordingly; but there must be something more than a mere *offer* of a bribe; there must be an acceptance of the offer—an actual *agreement* come to, to vote in pursuance of it. Here every thing lay in offer merely; there was a proposition to the voter, not assented to at the time, and no proof of any subsequent act done between the parties. *Henslow v. Fawcett* (a) is no authority in favour of the plaintiff; all that was there decided was, that the receipt of the bribe made the offence of corrupting complete, although the voter afterwards broke his promise, and voted the other way. On so highly penal an act as this, the plaintiff is bound to make out a case clearly and unequivocally within it. [*Alderson*, B.—The difficulty is, whether this was not a question for the jury. If I had been desired, I ought certainly to have left it to the jury. *Parke*, B.—There certainly is evidence from which the jury might draw the conclusion that the proposition was assented to, or the contrary].

Erle, contrà, was stopped by the Court.

PARKE, B.—I am of opinion that this rule ought to be

(a) 4 Nev. & M. 592; 3 Ad. & E. 51.

absolute; and on the next trial the question will be, whether this was an offer accepted by Wakefield, in which case the offence of corrupting would be complete, or whether it was a mere offer not accepted, in which case that offence will not have been committed. The act of parliament contemplates three descriptions of offences:—First, that of procuring the party to give his vote for a particular candidate—that is, when he votes in pursuance of the corrupt agreement; secondly, that of *corrupting* the voter—where the bribe is offered and accepted, an actual agreement is made, and the party promises to act upon it. That was the case of *Henslow v. Fawcett*. In that case *Patteson, J.*, and *Coleridge, J.*, stated it as their opinion, that the *fraud* of the voter would make no difference in the offence—that if there be an apparent agreement, it matters not whether the party afterwards actually gives, or intends to give, his vote in pursuance of the agreement or not. Lord *Denman*, and *Littledale, J.*, gave no opinion on that point. I certainly think, however, that that is the correct doctrine, and therefore that if it be proved that there was an agreement to vote in pursuance of the offer, no matter whether the party intended to perform it or not, the offence of corrupting is complete. Then the third offence is a new one, not found in the old Bribery Act, where the whole that appears is the mere offer of a bribe, refused on the other side, or not assented to at the time. Now the evidence given in this case *may* be construed to prove that the offer was accepted; if the jury shall be of that opinion, the offence of corrupting was complete; but on the other hand, they may well come to the conclusion that the voter had not made up his mind, but took time to consider further whether he would accept the offer: in that case the offence was not complete, but it was a mere offer to corrupt, within the third clause of the act of parliament.

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BOLLAND, B.—I agree that it ought to have been left to the jury, on this evidence, to decide whether the agreement was complete.

ALDERSON, B.—I am of the same opinion: and I am glad that I have accomplished the object I had in view in nonsuiting, that the Judge, on another trial, will have the opportunity of knowing what is the law, according to the opinion of this Court; viz. that if the two parties have agreed, the one to offer, the other to accept, the hauling of stones as the condition of voting for particular parties, the offence stated in the declaration is complete; and that whether the man afterwards votes for the one or the other party is immaterial. I certainly think there was abundance of evidence from which the jury might well find that it was only an offer, not accepted at the time.

GURNEY, B., concurred.

Rule absolute.

Erle applied for leave to add a count alleging an offer to corrupt, but the Court refused to allow it.

HENDERSON and Others v. SHERBORNE.

A parish officer who supplies goods for his own profit to an individual pauper, is not liable to the penalty imposed by the 55 Geo. 3, c. 137, s. 6.

Quere, whether that clause is impliedly repealed by the 4 & 5 Will. 4, c. 76, s. 77.

DEBT for a penalty of 100*l.*, alleged to have been incurred under the 55 Geo. 3, c. 137, s. 6. The declaration stated, that the defendant, after the 14th day of August, 1834, to wit, on the 2nd Oct., 1835, was an assistant overseer of the hamlet of Oldland, in the parish of Bitton, in the county of Gloucester, and being such assistant overseer, did, during the time he retained such appointment, in his own name, furnish and supply for his own profit, certain goods, to wit, one coat, for the support and maintenance of *the poor* of and in the said hamlet, for which

the defendant was appointed such assistant overseer as aforesaid, not having received any certificate from any justice of the peace permitting and suffering him to do so, whereby the defendant forfeited a penalty of 100*l.*, &c. Plea—nunquam indebitatus. At the trial before *Littledale, J.*, at the last Gloucestershire Assizes, it was proved, that the defendant, being the assistant overseer of the parish of Bitton, and the vestry having made an order that a coat should be given to one of the paupers, the defendant supplied him with an old coat of his own, and charged and was allowed for it in his accounts. It was objected, on the authority of *Proctor v. Mainwaring (a)*, that this was not a supply of *the poor*, within the meaning of the statute; and the learned Judge, being of that opinion, directed a nonsuit. In the following term, *Ludlow, Serjt.*, obtained a rule nisi for a new trial; against which

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Talfourd, Serjt., and *R. V. Richards*, now shewed cause.—It is impossible to distinguish this case from *Proctor v. Mainwaring*, which is a direct decision that the supply of articles by an overseer to an individual pauper is not within the prohibition of the statute, but that it clearly points to a contract for a general supply. And the 77th section of the new Poor Law Act, 4 & 5 Will. 4, c. 76, which prohibits, under a penalty of 5*l.*, the supplying of goods by a parish officer by way of relief to *any person* in the parish, appears to have been introduced expressly to meet such a case as the present, and therefore to recognise the decision in *Proctor v. Mainwaring* as having put the proper interpretation on the former act. And if that decision were not the right one, the effect would be that the number of penalties would be multiplied according to the number of paupers receiving the supply. It is true, that in *Pope v. Backhouse (b)*, a supply to *some*

(a) 3 B. & Ald. 145.

(b) 8 Taunt. 239; 2 B. Moore, 186.

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of the poor was considered within the statute; but the point was not brought directly under the notice of the Court; the only question mooted being whether the defendant was liable, having furnished the articles, which were the produce of his own land, to the poor, at a fair market price.

Ludlow, Serjt., in support of the rule.—It cannot be doubted that this is peculiarly a case within the *mischief* intended to be prevented by the act of parliament. And the question comes to this,—whether a supply by an overseer to any number of the poor short of the entire body is within the prohibition; for no distinction can be taken between a supply to a single pauper, and to any given number short of the whole: the words must either be construed to mean, a supply to the whole body of the poor, or must be applicable distributively. The object of the statute is not only to prevent abuse of the parish rates, by officers paying into their own hands, but also to secure the poor wholesome provisions and proper clothes; *Stanley v. Dodd* (a), *Barber v. Waite* (b). That object is plainly defeated, although not so extensively, by a supply to a part of the poor, as well as to the whole. A contract for the use of the workhouse *could not* apply to the whole poor of the parish, since only certain descriptions of poor were to be relieved in the workhouse. *Proctor v. Mainwaring* was decided merely on the motion for a rule nisi; and the jury had found also that the pauper had voluntarily agreed to take the articles in lieu of relief. But *Pope v. Backhouse* is altogether at variance with that decision.

As to the 4 & 5 Will. 4, c. 76, s. 77, it would seem to apply, not to persons in office, but to other parties coming

(a) 1 Dowl. & R. 397. (b) 1 Ad. & Ell. 514; 3 Nev. & M. 611.

casually in contact with the poor (a). But if it does apply to the former also, it does not operate as a repeal of the 55 Geo. 3, c. 137, s. 6, but only gives a cumulative remedy. It is founded rather on the 42nd section of Gilbert's Act, 22 Geo. 3, c. 83.

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LORD ABINGER, C. B.—I think there is sufficient doubt, on the words of the first act of parliament, to have made me say that I should have been better satisfied if the Court of King's Bench had granted a rule in the case of *Proctor v. Mainwaring*; yet I am very far from being prepared to say, that that decision was wrong. The principle adopted by Lord *Tenterden*, that a penal law ought to be construed strictly, is not only a sound one, but the only one consistent with our free institutions. The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so. But I think there is another ground for not disturbing this nonsuit. If the 77th section of the new Poor Law Act embraces this case, I do not agree that it does not amount to a repeal of the former enactment. If a crime be created by statute, with a given penalty, and be afterwards repeated in another statute, with a lesser penalty attached to it, I cannot say that the party ought to be held liable to both. There may, no doubt, be two remedies for the same act, but they must be of a different nature. The new act, then, would be in effect a repeal of the former penalty. It appears to me, therefore, reasonable to suppose, that in enacting this clause of the Poor Law Act, the legislature had in contemplation the decision in *Proctor v. Mainwaring*, and accordingly provided for the particular case, and annexed to it a specific penalty. Under these circumstances, although

(a) The prohibition of the 55 extended to officers appointed Geo. 3, c. 137, s. 6, is, by the 4 & under that act.
5 Will. 4, c. 76, s. 51, expressly

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I might originally have entertained some doubt, I think it right to adhere to the decision in *Proctor v. Mainwaring*.

PARKE, B.—I also think we are bound by the case of *Proctor v. Mainwaring*, although, if I had to form an opinion on the facts of that case for the first time, I am not prepared to say that I should have quite assented to the reasons assigned by the Court for their judgment. But after that decision, I think we should be bound by it; and certainly a considerable argument arises in support of it, from the provision found in the 77th section of the Poor Laws' Amendment Act: that appears very much like a legislative recognition of the propriety of the decision on the former statute.

BOLLAND, B.—I am of the same opinion. I think we are bound by the decision in *Proctor v. Mainwaring*, whatever my opinion might have been upon it when it arose.

GURNEY, B., concurred.

Rule discharged.

LINDUS v. POUND.

If a special demurrer be delivered without a marginal note of the matter intended to be argued, the Court will set it aside. But it is sufficient if it state that the points intended to be argued are those stated in the demurrer itself.

THE defendant in this case had demurred specially to a count on an account stated, for the want of a sufficient allegation of time, (the word "then" being omitted (a)); but the demurrer was delivered without any marginal note; for which omission *Humfrey* obtained a rule nisi to set it

(a) See *Ferguson v. Mitchell*, 2 C. M. & R. 687.

aside, as being in violation of the rule of H. 4 Will. 4, No. (2) (a). *Exch. of Pleas, 1837.*

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Mansel shewed cause, and urged, that this being a special demurrer, it could not be necessary to state over again in the margin the same grounds already stated in the body of the demurrer; and said that *Patteson, J.*, had, in several instances, overruled a similar objection at chambers.

PARKE, B.—The rule of court directs, that in the margin of every demurrer there shall be a note of the matter of law intended to be argued. It is a sound principle of construction to suppose that people mean what they say. You should have stated in the margin, that the points intended to be argued were those stated in the demurrer itself. *Taunton, J.*, indeed, doubted whether this was sufficient, but the Judges, on conference, considered that it was.

Rule absolute.

(a) "In the margin of every demurrer, before it is signed by counsel, some matter of law intended to be argued shall be stated; and if any demurrer shall be delivered without such statement, or with a frivolous statement, it may be set aside as irregular by the Court or a Judge, and leave may be given to sign judgment as for want of a plea."

ROY v. BRISTOWE.

THE declaration in this case contained two counts; of which the first alleged, that one E. T. was the owner and proprietor of divers, to wit, eleven shares in the Manchester, Bolton, and Bury Canal Navigation Railway, and that the plaintiff afterwards dealt with the defendant, as the agent of the said E. T., authorized by him to sell the said shares; and the plaintiff entered into a contract

A rule to strike out any of the counts of a declaration must be drawn up on reading the declaration, or on an affidavit stating the nature and effect of the different counts.

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with the defendant, as such agent of the said E. T., so authorized by him, and agreed to buy the said eleven shares; that the defendant undertook and promised that he was then authorized by the said E. T. to sell the said shares, yet that the defendant was never authorized by E. T. to make such contract, and E. T. refused to be bound by and repudiated the same; by reason whereof the plaintiff was prevented from buying other shares which he would have bought, and of making profits thereby, &c. The second count stated that, in consideration that the plaintiff, at the request of the defendant, agreed to buy of him eleven shares in the said railway, the defendant undertook and promised the plaintiff to cause the said shares to be transferred to the plaintiff in a reasonable time; and alleged that, although the plaintiff was ready to buy the shares, and accept the said transfer, the defendant did not nor would cause the said shares to be transferred to the plaintiff, but therein wholly failed and made default, &c.

Cowling had obtained a rule nisi to strike out one of these counts, as being joined in breach of the rule of H. 4 Will. 4, No. 5; citing *Jenkins v. Treloar* (a).

Crompton shewed cause, and objected that the rule was not properly drawn up; not being drawn up on reading the declaration, or any affidavit stating the nature or effect of the several counts.

Cowling, contra, stated that the rule was drawn up in the same form as in *Jenkins v. Treloar*; but

THE COURT held that it was not in the proper form, and on this ground the rule was

Discharged.

(a) 1 M. & W. 16. See *Price v. Morgan*, ante, p. 53.

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BLUNDELL v. HANSON.

THE plaintiff, on the 9th of January, 1837, declared in chief: the declaration was indorsed to plead in four days, and on the same day the plaintiff demanded a plea. On the 13th the time for pleading expired, and at one o'clock on the 14th the plaintiff signed judgment for want of a plea.

R. V. Richards obtained a rule nisi to set aside this judgment for irregularity, upon the authority of *Kemp v. Fyson* (a).

Jervis shewed cause.—It does not appear in the report of *Kemp v. Fyson*, when the demand of plea was given. If it was given on the day when the time for pleading expired, the practice would be governed by the rule H. T. 2 Will. 4, s. 66 (b), and the decision would be correct. If otherwise, the Master, upon whose certificate that decision was founded, must be mistaken, and the case cannot be treated as authority. The defendant contends for an additional day; but the rule H. T. 2 Will. 4, viii., expressly declares that the time shall be reckoned exclusively of the first day and inclusively of the last day, according to which calculation the time for pleading would expire on the 13th, and not on the afternoon of the 14th, as the defendant contends. *Kemp v. Fyson* has not been recognised in the Court of King's Bench.

Richards, contra.—The defendant relies upon the case of *Kemp v. Fyson*, which has been acted upon at chambers.

(a) 3 Dowl. P. C. 265.

(b) Which provides, that "judgment for want of a plea after demand may, in all cases, be signed

at the opening of the office in the afternoon of the day after that on which the demand was made, but not before."

A declaration was delivered on the 9th of January, indorsed to plead in four days; and on the same day the plaintiff demanded a plea. The plaintiff having signed judgment for want of a plea at one o'clock on the 14th. *Held*, that judgment regular.

CASES IN THE EXCHEQUER,

1845.
 V. NOBLE
 HANSON.

PARKE, B.—I have reason to believe that complaints have been made of the decision in *Kemp v. Fyson*. It proceeded upon the certificate of Master Walker, who now himself doubts its accuracy. We must be governed by the rule of court, but, as the defendant acted upon *Kemp v. Fyson*, the rule will be discharged without costs.

ALDERSON, B.—I have felt myself bound at chambers by the decision in *Kemp v. Fyson*, but I have not approved of it.

Rule discharged, without costs.

DUNCAN v. CAPE.

All matters in difference between G. and H. were referred, by a Judge's order, to arbitration, and an agreement of reference was entered into between them, in which H. was described as the administrator of A., to whom certain leasehold premises, the right to which was in dispute, had belonged. The arbitrator directed the premises to be sold by an auctioneer, whose appointment was assented to by both parties. G.'s attorney, who, at the time of the sale, was aware that H. had not taken out administration, became the purchaser, and paid a deposit to the auctioneer, it being understood, at the time of the sale, that H. would take out administration. H., however, afterwards refused to do so, and a good title was not made out:—*Held*, that the purchaser was entitled to recover his deposit from the auctioneer, without notice of the contract having been rescinded.

ASSUMPSIT for money had and received. Plea—non assumpsit. At the trial before Lord Abinger, C. B., at the London Sittings after last Michaelmas Term, it appeared that the action was brought to recover the amount of a deposit which had been paid to the defendant, an auctioneer, on the sale of a certain leasehold estate, at which the plaintiff was the highest bidder, and was declared the purchaser, the vendor not having made a good title. The property in question had belonged to a person of the name of Adams, who had died intestate, and no administration had ever been taken out to his effects. The plaintiff acted as the attorney of a person named Griffin, who claimed the property, and one Hayward, an attorney, represented the interest of the intestate's estate. Proceedings in ejectment had been depending between Adams

G.'s attorney, who, at the time of the sale, was aware that H. had not taken out administration, became the purchaser, and paid a deposit to the auctioneer, it being understood, at the time of the sale, that H. would take out administration. H., however, afterwards refused to do so, and a good title was not made out:—*Held*, that the purchaser was entitled to recover his deposit from the auctioneer, without notice of the contract having been rescinded.

and Griffin, and on the 14th of February, 1832, by an order of *Parke, B.*, the matters in difference between Griffin and Hayward were referred to arbitration, and the order directed that Hayward should take out administration. An agreement of reference was then entered into and executed, in which Hayward was described as the administrator of Adams. The arbitrator awarded, that the premises should be forthwith sold by the defendant, an auctioneer, appointed with the sanction of both parties. At the sale, Hayward, in the first instance, became the highest bidder, but he not having paid the deposit, the property was again put up for sale, when the plaintiff became the purchaser, and paid the deposit. Hayward afterwards refused to take out administration, and a good title was not made out. It was proved that one of the tenants of the premises had paid an acknowledgment to the plaintiff as landlord. The defendant contended, first, that the action having been brought without any notice of the contract having been rescinded, it could not be maintained: it was objected, secondly, that the plaintiff was aware of the defect of title when he bid for and became the purchaser of the premises; and thirdly, that there having been an attornment by one of the tenants to the plaintiff, it was tantamount to possession of the premises; and that after that the contract could not be rescinded. The Lord Chief Baron overruled the objections, giving the defendant leave to move to enter a nonsuit; and the jury found a verdict for the plaintiff, damages 87*l.* 10*s.*, the amount of the deposit.

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Sir *W. W. Follett* now moved accordingly.—First, the deposit having been received by the defendant with the authority of both parties, he became a stakeholder for them, and no action was maintainable until notice had been given that the contract was rescinded. Secondly, it having been proved that an acknowledgment had been

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paid to the plaintiff by one of the tenants of the premises, that was equivalent to taking possession of the estate, and where that has happened, the contract cannot be rescinded, because the parties cannot be placed in statu quo; *Hunt v. Silk (a)*. And the same doctrine prevails in courts of equity. [*Parke, B.*—Do you say that the purchaser is bound to take the estate with the title as it is?] He may not be bound to do so, but he is not entitled to the deposit after he has taken possession. [*Parke, B.*—How is the contract altered by his taking possession? We must deal with this as a legal question. This is not a case of the rescinding of a contract, but it is a case where the defendant, an auctioneer, receives a deposit, to be paid over in one event to one party, and in another event to the other party; that event is the completing of a good title. He is to pay the money to the vendor, if a good title is made out; if not, then he is to pay it to the vendee. The only question is, has that event happened?] This is different from the ordinary case, because here the plaintiff was aware of Hayward's not having taken out administration at the time he agreed to purchase the property, and has no right, therefore, to complain of that defect; here, he knew of the defect, and authorized the sale. [*Lord Abinger, C. B.*—All parties, at the time of the sale, relied upon Hayward's taking out administration, and completing the title.] Still, he authorizes the defendant to receive the money with a knowledge of the defect in the title.

LORD ABINGER, C. B.—This case depends on its own circumstances. It appeared, from the evidence on the part of the plaintiff, that the defendant was an auctioneer who held a sum of money which had been paid to him on a purchase, where the title had not been completed. It was objected at the trial, that he ought to have had notice

(a) 5 East, 449.

of the contract's having been rescinded, and I was inclined to nonsuit on this ground ; but the defendant proved that he was something more than an auctioneer, and it seemed to me that he was a stakeholder. That being the case, I thought he was not entitled to notice. All the parties had a full knowledge of the defect in the title, and the money was paid upon the understanding that a certain act would be done, which would remedy it. It was his duty to ascertain whether that stipulation had been performed. If the defendant had held the money simply as an auctioneer, he might, perhaps, have been entitled to notice ; but I think he must be taken to be a stakeholder, and that the plaintiff is entitled to recover without notice.

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PARKE, B.—It seems to me, that this is the common case of a sale by auction, where the defendant is a stakeholder, and where the payment of the deposit depends upon one event,—that of a good title being made out. If a good title is not made out, then he is to pay it over to the vendee. That event has happened in this case, and the vendee became entitled to his deposit, because the title was not completed. According to strict law, the defendant was not entitled to notice (a).

BOLLAND, B., concurred.

Rule refused.

(a) See *Gray v. Gutteridge*, 1 Man. & Ry. 614.

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CARRINGTON v. ROOTS.

Where a party had purchased, by a verbal contract, a growing crop of grass, with liberty to go on the close wherein it grew, for the purpose of cutting and carrying it away:—*Held*, that he could not maintain trespass against the seller for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass; for that this was, in substance, an action charging the defendant on the contract, within s. 4 of the Statute of Frauds.

A contract for the sale of an interest in land, without a note in writing, may operate as a *license*, so as to excuse the entry of the purchaser on the land, but it cannot be made available in any way as a *contract*.

TRESPASS for seizing and impounding a horse and cart of the plaintiff's. Plea—that at the time when, &c. the defendant was lawfully possessed of a certain close, with the appurtenances, situate in the parish of St. John's, Hampstead, and was also possessed of a certain crop of grass there then growing and being; and that because the horse and cart were wrongfully incumbering the close, and doing damage there, he took and distrained the same, &c. There was another plea similar to this, except that it alleged that the defendant seized the horse and cart for the purpose of removing and carrying away the cart from the said close. Replication, that before the said time when, &c., and while the said close and crop of grass were the close and grass of the defendant, to wit, on &c., the defendant agreed to sell, and sold to the plaintiff, and the plaintiff then agreed to buy, and bought of the defendant, the said crop of grass, at and for a certain sum, to wit, at the rate of 5*l.* 10*s.* per acre for each acre of the said grass, with liberty to the plaintiff to cut the said grass, and take the same from the said close when fit to be cut and taken, and for that purpose to enter into and upon the said close with his horse and cart; by virtue of which agreement the plaintiff afterwards, to wit, on, &c., entered into the possession of the said crop of grass, and became and continued possessed thereof until the defendant, before the said time when, &c., wrongfully took possession of a part of the said crop without the plaintiff's consent; and that the said crop of grass was fit to be cut and taken, and the plaintiff, for the purpose of cutting and taking away the said grass, before the said time when, &c., brought his said horse and cart into the said close, and upon the said crop of grass therein; wherefore the defendant committed the trespass of his own wrong, &c. There was a similar

replication to the other plea. The defendant, by his rejoinder, denied that he agreed to sell, or sold, or that the plaintiff agreed to buy, or bought, the grass, with liberty to him to cut or take it, or to enter into or upon the close with his horse and cart; on which issue was joined.

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At the trial before *Gurney, B.*, at the London Sittings in last Michaelmas Term, it appeared that in May last the plaintiff had verbally agreed with the defendant to buy of him a crop of grass growing in a field of four acres belonging to the defendant, near Hampstead, at the price of 5*l.* 10*s.* per acre, to be cleared by the end of September. One of the terms of the bargain was stated to be, that half the price should be paid down before the plaintiff cut any of the grass; and the plaintiff not having paid this money, the defendant turned the plaintiff's horse and cart out of the field, and prevented him from cutting or carrying away the grass, which was the trespass complained of. For the defendant, it was objected that, whether this were to be considered as a sale of an interest in land or of goods, the action was not maintainable, for want of a memorandum in writing of the contract: and that if it were to be deemed, as stated on the record, to be a contract for the sale of goods, there was a variance between the declaration and the evidence; for that the latter shewed it to be a sale of an interest in land. The learned Judge reserved the points, and the plaintiff having obtained a verdict,

J. Greenwood, in Michaelmas Term, obtained a rule nisi for a nonsuit, against which

Erle and *Chandless* now shewed cause.—This is not the case of a sale of a chattel, so as to render a memorandum in writing requisite under the 17th section of the Statute of Frauds, but of a contract for the sale of an interest in land, within the 4th section. And although,

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if this were an action brought for the purpose of directly enforcing the contract, a memorandum in writing would equally be requisite under the 4th section, that is not so in the present case, which is an action of trespass, founded on the plaintiff's possession of the close, to recover damages for the wrongful seizure of his horse and cart. The language of the fourth and of the seventeenth sections differs materially. The latter expressly makes the contract itself void; but the former only declares that no action shall be brought *to charge the defendant on the contract*. The plaintiff, therefore, has a right to avail himself of the contract in fact made between him and the defendant, for any collateral purpose—such as to repel a trespass committed by the defendant—although he is precluded from bringing any action directly to enforce it. This appears to be the construction put upon the statute by Lord *Ellenborough*, in *Crosby v. Wadsworth* (a), where he says—“The statute does not expressly and immediately vacate such contracts if made by parol; it only precludes the bringing of actions to enforce them, *by charging the contracting party or his representatives on the ground of such contract, or of some supposed breach thereof*; which description of action does not properly apply to the one now brought, viz.—*a mere action of trespass, complaining of an injury to the possession of the plaintiff, however acquired, by contract or otherwise*.” So, in *Teal v. Auty* (b), where the defendants were sued for the price of some growing trees, which they had purchased, cut down, and carried away, and the plaintiff was nonsuited for want of producing a proper written memorandum of the contract, it is said in the judgment of the Court—“If an action had been brought *to enforce* such a contract (for the purchase of an interest in land), the objection that the memorandum attest—
ing it was not signed by the parties, and stamped, would

(a) 6 East, 611.

(b) 2 Brod. & B. 99.

have been well founded; here, however, the agreement was executed. We need not refer to a variety of cases where, upon an executed agreement, the party has been entitled to recover, although he could never have prevailed had the contract been contested before it was executed."

The construction which has been put upon other statutes expressed in similar words, furnishes an analogy strongly applicable to this case. Thus, the Statute of Limitations, 21 J. 1, c. 16, s. 3, enacts that all actions on the case, except slander, shall be commenced and sued within six years after the cause of action, and not after: yet it is necessary to take advantage of the statute by pleading it; and that the statute does not altogether defeat the debt, but only takes away the remedy by action, is clear from the circumstance that a lien may exist for a debt to which the statute applies. Again, the act for the prevention of the sale of spirituous liquors in small quantities, 24 Geo. 2, c. 40, enacts, that no person *shall maintain any action* where the debt has not been contracted at one time to the amount of 20s.; but it has been distinctly decided that the debt is not therefore void, but that money paid generally by the debtor may be appropriated to the discharge of a debt contracted in violation of the provisions of the statute; *Cruickshanks v. Rose* (a). In like manner the *trespass*—the injury to the plaintiff's *actual possession*—being the substantial ground of action in the present case, and the contract being introduced only incidentally and collaterally, and not for the purpose of being enforced as a contract, the prohibition of the statute does not preclude the plaintiff from recovering, if this be the case of a contract for the sale of an interest in land, and so within the 4th section. Then, is it such a contract? It is submitted that it clearly is. It is an agreement for the sale of a growing crop of grass, made before it is in a state

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(a) M. & Rob. 100. And see *Philpott v. Jones*, 2 Ad. & Ell. 41.

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to be cut and carried away: not a sale of grass already severed, or to be severed by the seller. The plaintiff is to cut it, and to have the use of the land for the purpose. The distinction established by the authorities is between things which would be emblements, which are to be considered as chattels, whereas those which would not be emblements are considered to be interests in land, as parts of the inheritance; *Evans v. Roberts* (a). Thus, the sale of growing underwood, to be cut by the purchaser, has been held to confer an interest in land; *Scorell v. Boxall* (b). *Smith v. Surman* (c) is distinguishable: there the contract was for the timber of growing trees at so much a foot, i. e. for the produce of the trees when they should be severed, not for the growing trees themselves. Wherever the subject matter of the contract is any thing which has constituted a part of the inheritance, and has not been severed from it by the act of the tenant, it is a contract for the sale of an interest in land. That principle clearly comprehends the present case.

Greenwood, contra.—First, this action cannot be maintained, for want of a written memorandum of the contract. Admitting that this was a contract for the sale of an interest in land, it is avoided by the statute; or at all events, this is in substance an action for the enforcement of that contract, and therefore directly within the prohibition. It is true that the 4th & 17th sections are expressed in different terms; but it is evident that the legislature could not have intended to make a different provision in the two cases: and the ordinary inference which would arise from the discrepancy of language, is much weaker than it would be if the two provisions were in juxtaposition, instead of being disjoined by a great variety of other matters. The act is throughout very irregularly framed: but the object

(a) 5 B. & C. 829. (b) 1 Y. & J. 396. (c) 9 B. & Cr. 561.

of the legislature clearly was, to require written evidence in both of these cases; and in each, the meaning of the statute is that a parol contract shall be invalid for all purposes. It is admitted that there is no remedy on the contract; if so, how can it confer any right? The language used by the judges in the different cases shews that this is the recognised interpretation put upon the statute: *Chater v. Becket* (a), *Thomas v. Williams* (b). The construction put upon the other statutes referred to on the other side, does not furnish the analogy which is contended for. It is true that a lien is not barred by the Statute of Limitations: but on the other hand, a debt barred by it cannot be set off. So, a direction in a will to pay debts does not apply to a debt barred by the statute; *Ex parte Dewdney* (c). Again, as to the Spirituous Liquors' Act, *Scott v. Gilmore* (d) is a distinct authority to shew that it not only prevents the bringing of an action on the contract, but avoids the contract itself, and even vitiates a security referable, as to part only of its consideration, to such contract. With regard to the observations of Lord *Ellenborough* in *Crosby v. Wadsworth*, the only real extent of them is, that the contract, though *void as a contract*, may be made available as a *licence*, if pleaded as such. If it had been so pleaded here, the defendant would have had the opportunity of replying, and shewing that it had been countermanded. But in the next place, this *is* in substance an action brought whereby to charge the defendant on the contract. On this point, *Scorell v. Boxall* is an authority for the defendant, and indeed goes beyond the present case. There it was held, that the plaintiff, who had purchased the growing underwood by parol, had not such a possession as would enable him to maintain

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(a) 7 T. R. 201.

v. *Scott*, 1 Russ. & M. 255, contra.

(b) 10 B. & Cr. 664.

(d) 3 Taunt. 226.

(c) 15 Ves. 488; but see *Jones*

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trespass, even as against third parties: the action being substantially based on his title, and his title depending wholly on the contract. The statute does not mean that the action must be such as that the contract is necessarily set out in the declaration; but it applies wherever the action is brought substantially to enforce it, or depends on a right resulting out of it.

But secondly, there is a variance between the record and the evidence. On the face of the record, it is a contract for the sale of goods within the 17th section; according to the evidence, it is for the sale of an interest in land, within the 4th. This is therefore a variance for which the plaintiff ought to be nonsuited. The *crop* is contradistinguished, in the declaration, from the *close*; and the issue is in the same form: it appears, therefore, from the way in which the parties have chosen to describe their contract, that what was intended to be purchased was the crop of grass only, with an easement over the field for the purpose of cutting it, and not any interest in the land itself. That is a purchase of a chattel; *Evans v. Roberts* (a), *Hal-len v. Runder* (b). [He was here stopped by the Court.]

Lord ABINGER, C. B.—If this be a contract for the sale of goods, it is not disputed that it is void by the 17th section of the statute. But if that be doubtful, and it is to be considered as the sale of an interest in land, and therefore within the 4th section, then the question is, whether that section, which declares that no action shall be brought whereby to charge any person on a contract for the sale of an interest in land, means that the contract shall be available for any purpose as a contract, excepting that of being enforced by action. I think it does not; and that the contract cannot be available as a contract at all, unless an action can be brought upon it. What is done

(a) 5 B. & Cr. 829; 8 D. & R. 611.

(b) 1 C. M. & R. 266.

under the contract may admit of *apology* or *excuse*, *diverso intuitu*, if I may so speak; as where, under a contract by parol, the party is put in possession, that possession may be set up as an excuse for a trespass, alleged to have been committed by him. But wherever an action is brought on the assumption that the contract is good in law, that seems to me to be in effect an action on the contract; as has been ingeniously argued by Mr. *Greenwood*. If the whole transaction between the parties were set forth in the declaration, the contract would form part of it: and in effect, the plaintiff now says that the defendant ought not to take his cart, because it was lawfully there under that contract. This is a collateral and incidental mode of enforcing the contract, though it is not directly sued upon. I think, therefore, that the meaning of the statute is, not that the contract shall stand for all purposes except that of being enforced by action, but it means that the contract shall be altogether void. Then what is the meaning of this replication? I think it means that this was an available contract to give a right, capable of being enforced by action. A party cannot have a lawful right which the law will not sustain; it is not a lawful contract, which gives a right, if it cannot be enforced at law. The replication means, therefore, that this was a lawful contract, which conferred a right: but the evidence shews that it was not so, because it was not in writing, and therefore void under the statute. It would be a different case if the plaintiff had been sued by the defendant in trespass; he might have pleaded a *licence*; but though a licence may be part of a contract, a contract is more than a licence. The agreement might have been available in answer to a trespass, by setting up a licence; not setting up the contract itself as a contract, but only shewing matter of excuse for the trespass. That appears to me the whole extent to which the plaintiff could avail

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himself of the contract. I am therefore of opinion that the replication is not sustained, and that there ought to be a nonsuit.

PARKE, B.—I am of the same opinion, though I have had some doubt in the course of the argument. This is a declaration in trespass, for seizing and detaining a horse and cart, the property of the plaintiff. The defendant pleads to this, that he was lawfully possessed of a certain close, and also of a crop of grass there growing, and that he took the horse and cart because they were wrongfully encumbering the *close*, and doing damage to it. The last circumstance stated in the plea is not wholly immaterial to the construction of what follows—to the question whether this was a licence, or a binding agreement, the effect of which was to give an interest in the crop, and a right to enter on the land for the purpose of taking it. My judgment, however, does not proceed on that, but would be the same if that allegation were omitted. The question is, what the plaintiff means when he avers in his replication, that while the close or crop of grass were the property of the defendant, he agreed to sell, and sold to the plaintiff, and the plaintiff agreed to buy, and bought of him, the crop of grass, at a certain price per acre, with liberty to the plaintiff to cut and take away the grass, and to enter upon the close with his horse and cart for that purpose, by virtue of which he became possessed of the crop of grass. Does he mean an agreement in fact, operating as a licence only, or a binding contract for the sale of the crop, and for him, the plaintiff, to have a right of entry on the land to gather it? I think the latter is the true construction; and that it means a contract which the one party could enforce against the other as matter of right. If this be so, then, supposing the agreement to be for the sale of chattels, it was not proved by the evidence; if it was an agreement for the sale of an interest in land, it was not binding, by virtue of

the 4th section of the Statute of Frauds. I think the right interpretation of that section is this,—that an agreement which cannot be enforced on either side, is as a contract void altogether: no doubt it may have, as an agreement in fact, some operation in communicating a licence; but such licence would be countermandable: and that appears to be the whole effect of the decision in *Crosby v. Wadsworth*. Here, no doubt, the plaintiff might have pleaded a licence; but the defendant would have replied that it was countermanded, and the plaintiff could not have succeeded on that issue. I think, therefore, this is an averment of a binding contract for the sale of the crop, with a right to enter on the land in order to take the crop. That contract being void by the statute, the action cannot be maintained, and the rule ought to be absolute for a nonsuit.

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BOLLAND, B.—I am of the same opinion. The proper construction of this replication is, that by the agreement the plaintiff purchased the crop, with liberty to come upon the land for the purpose of taking it. If so, the issue is raised on the validity of the contract, for without the contract it is not shewn that the plaintiff had a right to be on the land. Taking it so, it furnishes no ground to support the right claimed, because it is altogether void by the Statute of Frauds.

GURNEY, B., concurred.

Rule absolute.

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**BELCHER and Another, Assignees of LEE and Others,
Bankrupts, v. JONES.**

A banking firm was in insolvent circumstances, and about to stop payment. A., a partner in the firm, informed B. of the fact, in order that the private balance of C., B.'s father, might be drawn out of the bank; but desired him not to let it be known to D., a shareholder in an insurance company which also had an account with the bank, as he, A., did not wish the directors to know of it. C.'s private balance was in consequence drawn out the next day. On the evening of that day A. informed C. of the state of the house. C., being a managing director of the insurance company, took measures by which the company's account was drawn out by a cheque upon the bank. Two days afterwards the house stopped:—*Held*, that this was not a fraudulent preference of the insurance company.

THIS was an action for money had and received, brought against the defendant as Secretary of the Phoenix Assurance Company, to recover a sum of about 8000*l.*, alleged to have been paid by the bankrupt Lee to the company, by way of fraudulent preference. Plea—non assumpsit. At the trial before Lord Abinger, C. B., at the London Sittings after last Trinity Term, the facts proved were as follows:—

The bankrupts, Messrs. Lee & Co., carried on the business of bankers in London, until the period of their stoppage as hereinafter stated. A Mr. Cooke, the father-in-law of the bankrupt Lee, kept a private account with them; and he was one of the managing directors of the Phoenix Company, which also banked with Lee & Co. The bank being in an embarrassed condition, and about to stop payment, the bankrupt Lee communicated that fact to his brother-in-law, Mr. Cooke's son, and told him that the bank would shortly stop payment; and it was then agreed between them that Cooke's private balance, amounting to about 2000*l.*, should be drawn out; but Lee desired Cooke not to give any information of the matter to a Mr. Davies, who was a shareholder in the Phoenix Company, as he, Lee, did not wish the directors of the Phoenix Company to know anything of it. In consequence of this communication, Cooke's private account was drawn out on the following day, which was Monday. On the evening of that day, Lee saw the elder Cooke, and informed him of the state of the house, and that it could not go on beyond the Wednesday following. Cooke in consequence filled up a cheque for the amount of the company's account, and dispatched his son with it to another of the directors, by whom it was signed, and

on the following morning the cheque was presented, and the money drawn out. On the Wednesday, Lee & Co. stopped payment. The Lord Chief Baron, on this evidence, left it to the jury to say, whether the bankrupt made the communications proved with the intention of giving any preference to the assurance company, directing them, if they thought that he had no such intention, to find for the defendant. The jury found for the defendant, and his Lordship gave the plaintiff's counsel leave to move to enter a verdict for the amount of the cheque.

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In Michaelmas Term, Sir *W. Follett* obtained a rule nisi, pursuant to the leave reserved; against which

Sir *F. Pollock*, *R. V. Richards*, and *Martin*, now shewed cause.—The finding of the jury, that there was no intention to prefer the assurance company, is conclusive of this case. The essence of a fraudulent preference is, that the party must entertain an intent of preferring the particular creditor in question. That is distinctly laid down in the case of *Fidgeon v. Sharp (a)*. There *Gibbs*, C. J., says,—“The general effect of the statutes on the subject of bankruptcies, that all payments made before bankruptcy are legal and valid; but a certain class of cases has arisen, in which certain payments have been supposed to be made in fraud of the bankrupt laws, and are therefore fraudulent and void. But I find in all the cases, from *Fordyce's* to the present, the fact found, that the act was done in fraud of the bankrupt laws: it must be an act, then, not only that in effect contravenes the bankrupt laws, but it must be done *with intent* to contravene them, and in contemplation of bankruptcy. The innocence or guilt of the act depends, then, on the mind of him who did it; and it cannot be in fraud of the bankrupt laws, unless the actor meant it should be so.” The doctrine of

(a) 5 Taunt. 539; 1 Marsh. 196; 2 Rose, 153.

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fraudulent preference, although it has now received a legislative sanction, was always considered as an excrescence on the bankrupt law created by judicial decision; and in recent cases the Courts have intimated their opinion that it has been carried too far, and will at all events be little disposed to extend it: *Crosby v. Crouch* (a), *Morgan v. Brundrett* (b), *Atkinson v. Brindall* (c). No case can be found in which a payment has been avoided, which was made to any other creditor than the party in whose favour the fraud was committed. Here the payment of the Phoenix Company's account was a mere consequential transaction, which the bankrupt not only never intended, but even guarded against. A man cannot be an unwilling or unconscious party to a fraud. Suppose a party in fear of bankruptcy went to consult a friend, not knowing that he was the bonâ fide holder of a large bill on which the former party was liable, but intending to avail himself of his advice or co-operation to assist some third party; but the person so consulted, in consequence, immediately took measures to secure himself—could it be said that this voluntary communication could form the ground of an action to recover back the money? Or suppose the insolvent party wrote a letter to a creditor, intending to give him a fraudulent preference, but misdirected it, and it fell into the hands of another creditor, who thereupon took measures to secure his debt; could that be deemed a fraudulent preference, the jury finding that there was no intention to prefer *that* creditor? [Lord Abinger, C. B.—That would be a merely *accidental* consequence of the bankrupt's act. Parke, B.—The question is, if there be a fraudulent preference, to what extent you can pursue its consequences. Suppose the bankrupt, intending to prefer a particular creditor, writes to him, telling him to burn

(a) 2 Camp. 165; 11 East. 256.

(c) 2 Scott, 229; 2 Bing. N.

(b) 5 B. & Ad. 289; 2 Nev. & C. 225.

M. 280.

the letter; but he shews it to another creditor, who goes and draws out his balance. That is exactly an analogous case, supposing the jury here to have acted on the understanding that there was a stipulation of secrecy.] Another analogous case would be that of a party, accidentally passing by, who should *overhear* such a communication. To sustain the argument on the other side, the bankrupt must be supposed to adopt all the probable consequences of his being overheard, and to be guilty of all the fraud resulting thereby. The object of the law is to coerce and restrain the disposing mind of the bankrupt, and to prevent him from wilfully disposing of his property to any other person than those to whom the law directs; and the result of all the cases is, that to constitute a fraudulent preference, the payment must be entirely voluntary, it must be made in contemplation of bankruptcy, and it must be found as a fact that it was made with intent to prefer the particular creditor in question. *Harman v. Fisher* (a), *Anderson v. Temple* (b), *Hartshorn v. Slodden* (c), *Vacher v. Cocks* (d), *De Tastet v. Carroll* (e).

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Sir *W. Follett* and *Wightman*, in support of the rule.—It must be conceded that the plaintiffs are bound by the finding of the jury, that there was no intention to prefer the Phoenix Company. But the facts of this case are such as distinguish it altogether from those put by way of illustration on the other side. The doctrine of fraudulent preference stands on this principle,—that all the creditors shall stand on an equal footing; the Court will not allow one creditor, or one class of creditors, to receive payment by means of the voluntary act of the bankrupt, made at a time when he is contemplating bankruptcy. Now, in the

(a) Cowp. 117; Loft, 472.

(d) 1 B. & Adol. 152.

(b) 4 Burr. 2239; 1 W. Blackst.
660.

(e) 1 Stark. N. P. C. 88; 2
Rose, 462.

(c) 2 Bos. & P. 585.

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present case, there can be no doubt that the transfer of this large sum of money was the effect of the bankrupt's voluntary act, viz. his communication to Cooke the father; nor that the firm at that time contemplated bankruptcy; the house did not stop in consequence of the drawing out of this money, but the stoppage had been determined on before. And the bankrupt clearly intended a fraud upon the law, so far as respected the private account of Cooke. Then the question is, whether, if the necessary or natural consequences of the fraud lead to a greater injury to the creditors than was expressly intended, the transaction is not also invalidated as to such consequences also. This is not the case of two separate creditors; it is a communication made to one party, who is a creditor in two rights. The question is, what must the bankrupt be held to intend? It is said, to prefer the particular creditor; but that assumes the whole question. The act of the bankrupt leads equally to both the payments. It is said, he does not know of this payment; but he is the acting party who puts the Phoenix Company in motion to obtain it, which is what is meant by the term *voluntary*. Suppose a party has an account with a bank, partly of his own, partly as a trustee; and the bankrupt makes a communication to him, with the purpose of giving the cestui que trust a preference: may the trustee go and draw out his own balance, to the injury of the other creditors? Or, suppose a party has a balance to his credit of 5000*l.*, and the bankrupt tells him the house is insolvent, but says at the same time, "Mind, I intend you only to draw out 2000*l.*;" but the creditor draws out the 5000*l.*—is that payment good? So, the case may be put of a communication made to a party who is a partner in two firms, intended for the benefit of one of them only, but used for the benefit of both. The general principle of law is, that if a party intends to do a criminal or fraudulent act, he is responsible for its consequences.

Every crime depends altogether on the *intent*; yet a party is guilty of murder if he kills A., intending to murder B., because it is an act done in pursuance of his illegal purpose, though not the act which he intended. Here, it is clear there is an unequal distribution of the funds, in direct consequence of the act of the bankrupt, which was committed with the intention of defeating such equal distribution, though not to the same extent. The principle of law ought to be fully carried out, so as to restore the equal distribution of the fund to the full extent to which it has been thus defeated.

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LORD ABINGER, C. B.—We shall take a short time to consider this case, not that we entertain any great doubt upon it, but the question being one of considerable importance, we think it right to give a deliberate judgment upon it.

Cur. adv. vult.

A few days afterwards,

LORD ABINGER, C. B., delivered the judgment of the Court.—In this case it appeared in evidence, that it never was the intention of any of the bankrupts that the party to whom the communication was made by one of them, should draw out the balance of the Phoenix Assurance Company, but only his own private balance. The jury, indeed, found the fact to be so; and the only question for our consideration was, whether, admitting the fact to be as found by the jury, yet, inasmuch as the communication was made to a director of the assurance company, and it was at least a probable consequence of such communication that he would act as he did, in withdrawing their balance, this amounted to a fraudulent preference. And the sum of the argument on the part of the plaintiffs appeared to be, that, notwithstanding a man's declared intention contradicting any design of a fraudulent preference, still if, in consequence of any act of his, any person

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whatsoever obtains a preference, that will render the transaction fraudulent. We think, if we assented to such a conclusion, we should carry the doctrine of fraudulent preference farther than any of the cases warrant. It is admitted, that the doctrine of fraudulent preference was engrafted on the bankrupt law by judicial decisions, more especially by those of Lord *Mansfield*, whence it has been imported into the statute 6 Geo. 4, c. 16. There had been a divergence from the principle acted on by Lord *Mansfield*, but latterly there has been a recurrence to the proper principle. We think that if we were to hold the circumstances of the present case to amount to a fraudulent preference of the assurance company, we should be stretching the cases too far. This money was paid out in the ordinary course of a banker's business, in consequence of a customer's cheque; and it appears that the other partners of the bankrupt who made this communication were not at all aware of this payment; besides the fact that it was made contrary to the intention of that bankrupt. It is nothing more than an ordinary payment on a banker's cheque. Put the case of a party who, intending a fraudulent preference to a person in the situation of Cooke, brings money and pays him his private debt, and the person so paid requires him to pay a trust debt also out of other money which he brings with him, and the debtor refuses; if the debtor afterwards delivers the residue of the money to a third party to take to lodge at a banker's for him, and that third party, (to whom also he is indebted), is advised by the person to whom the first payment is made, to apply it to his own debt; if he does so, would this be a fraudulent preference of him by the debtor? I think not: and if we were to hold the present case an instance of fraudulent preference, and the assignees entitled to recover, the lengths to which it might be carried would be quite extravagant.

Rule discharged.

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LADD v. LYNN.

ASSUMPSIT. The first count of the declaration stated, that certain differences existed between the defendant and Martha his wife, and that they were living apart from each other, and that it was desired by them, and particularly by the defendant, that they should live separate, and that a deed of separation should be prepared; and for effectuating the said desire and purpose it was expedient and necessary that some person should join in and become a party as trustee for the said Martha; and thereupon, in consideration that the said plaintiff would join in and become a party to such a deed as such trustee, the defendant promised the plaintiff to pay him all such costs as he might or should reasonably incur in arranging the proper terms of the deed, and causing a proper deed to be prepared and settled on his part as such trustee, and in and about the execution thereof by him. The declaration then averred, that the plaintiff did arrange the terms of the deed of separation, and procure a deed to be prepared on his part as such trustee, and that he executed the same, and that certain costs were incurred in that behalf, but that the defendant had not paid them. There were also counts for money lent, money paid, and on an account stated. Plea—the general issue. At the trial before Lord Abinger, C. B., at the Middlesex sittings after last Michaelmas Term, it appeared that differences had arisen between the defendant and his wife, which caused a separation, and it was agreed that a deed of separation between them should be prepared, and that the plaintiff should be appointed a trustee for the wife. The defendant's attorney accordingly prepared a deed, which he sent for perusal to the plaintiff's attorney, who acted as the friend of the wife. A counterpart of the deed was also prepared by the plaintiff's attorney, and executed by the parties; but the defend-

A husband, who had separated from his wife, agreed that a deed of separation should be prepared and executed:—*Held*, that the husband was not liable for the expenses of his wife's trustee in procuring a counterpart to be prepared and executed, in the absence of any promise by him to pay that expense.

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ant refused to discharge any expenses incurred by the wife respecting the deed of separation as a matter of right, but agreed to pay and did pay the expense incurred by the plaintiff's attorney for perusing the deed. Before the first instalment under the deed became due the plaintiff had advanced the wife a small sum of money. The action was brought to recover the expense of the counterpart and the money so advanced. It appeared that in consequence of some alleged misconduct, the defendant had turned his wife out of doors, and notice was given to the plaintiff and his attorney not to give her credit, as the defendant would not be responsible. The Lord Chief Baron was of opinion, on these facts being proved, that the plaintiff ought to be nonsuited, and directed a nonsuit accordingly, giving the plaintiff liberty to move to enter a verdict for such sum as the Court should think fit.

Sir *F. Pollock* now moved accordingly.—A counterpart of the deed of separation being necessary for the wife's security, the defendant was bound to pay the expense incurred in preparing it. The defendant having turned his wife out of the house, he was liable to pay any debts she might incur for necessaries; and it is immaterial that the husband has given notice that he will not be answerable for her debts. In *Jenkins v. Tucker* (a), it was held that when the husband went abroad and left his wife, who died in his absence, a third person, who voluntarily paid the expenses of her funeral, though without the knowledge of the husband, might recover from him the money so laid out. That shews that a person may contract a debt for necessaries on account of a wife abandoned by her husband, and if he pay those debts, he is entitled to recover the money back from the husband. When the liability arises independently of assent or dissent, the dissent will

(a) 1 H. Bl. 90.

not take away the right to recover. The counterpart of the deed was necessary for the wife's security. If it had not been executed, she might have said that she would not be satisfied, and then the husband must have had a suit for alimony brought against him: but he agrees to this deed in lieu of a suit for alimony. Then the plaintiff or the wife's trustee necessarily required a counterpart, as it would not be right that one deed only should be executed, to remain in the hands of the husband or his attorney; and the defendant must be liable to pay for the expense of it.

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LORD ABINGER, C. B.—The rule as to necessities for which a husband is liable, means such things as are necessary for the sustenance or protection of the wife.

PARKE, B.—I think a deed of separation cannot be called a necessary for the wife. It sometimes becomes a question whether the husband has entered into the particular contract, and made himself liable upon it; but here it appears that the husband disclaimed all liability.

BOLLAND, B., concurred.

Rule refused.

WESTBURY v. ABERDEIN.

ASSUMPSIT on a policy of insurance, dated the 3d November, 1835, on a ship called the King George, at and from Malaga to London, warranted to sail on the 10th of October. The defendant pleaded several pleas,

A policy of insurance on a ship called the King George, at and from Malaga to London, warranted to

sail on the 10th October, was effected on the 3rd November following. The insurer communicated to the underwriters that the King George, and another vessel called the Fruiter, both sailed from Malaga on the 10th October, and the underwriters knew that the Fruiter had arrived at London some days before; but the insurer knew also that the captain of the Fruiter had seen the King George off Oporto on the 21st October, when they had parted company by reason of a gale coming on; and this fact he did not communicate to the underwriters. The King George was lost in a storm, at the entrance of the Channel, on the 25th October. In an action on the policy, the jury having found for the plaintiff, and that the fact not communicated was not a material one, the Court granted a new trial.

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of which the third only need be stated. That *plea* alleged in substance, that after the said ship called the *King George* had sailed from the port of Malaga, and had completed more than half her voyage, she was seen at sea by the captain of another ship called the *Fruiter*, which arrived in the port of London five days before the policy was effected, of which fact the plaintiff had notice, but did not disclose the same, although a material one, to the underwriters. At the trial before Lord *Abinger*, C. B., at the London Sittings after Trinity Term, the following facts were proved :—The *King George* sailed from Malaga on the 10th October, 1835; the *Fruiter* had sailed from the same port the day before. Having passed safely through the Straits of Gibraltar, they were, on the 14th, in company off Cape St. Vincent, but separated again. On the 21st the captain of the *Fruiter* saw the *King George* off Oporto. On that day a gale came on, and they again parted company. The *Fruiter* arrived in the port of London on the 30th, and on the evening of that day the captain saw the plaintiff, who was the owner of the *King George*, and communicated to him the circumstances above stated. The policy was effected on the 3d November, and the time at which the two vessels sailed from Malaga was communicated to the underwriters; they knew also, from the entries at Lloyd's, that the *Fruiter* had arrived on the 30th; but the plaintiff did not inform them of the fact that the captain of the *Fruiter* had seen the *King George* off Oporto on the 21st. The premium taken was 60*s.*, the ordinary premium being 25*s.* The *King George* was lost in a storm, in the chops of the Channel, on the 25th of October. It appeared that the *Fruiter* had performed her voyage in the average time of a voyage from Malaga to London, and that the principal part of the risk is in the passage of the Straits of Gibraltar. The Lord Chief Baron left it to the jury to say, whether the fact of the *Fruiter* having seen the *King George* off Oporto was

material to be communicated to the underwriters, expressing his own opinion that it was not, and that, as the more dangerous part of the voyage had been safely performed, the knowledge of the vessel's having passed through the Straits would have rather diminished than increased the risk. The jury having found a verdict for the plaintiff,

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Sir *F. Pollock*, in Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection, citing *Kirby v. Smith* (a):—against which

Sir *W. Follett* (*Channell* with him) now shewed cause.—It could not be material to communicate the fact that the vessel was seen in the direct course of her voyage from Malaga to London. Being warranted to sail on the 10th of October, she must of necessity encounter the storm, and the underwriters knew that she had encountered it, and took an increased premium accordingly. If the fact not communicated had been such as, if communicated, would have informed them that she was exposed to a storm of which they had otherwise no knowledge at the time, the case might be different. How could the risk be increased by shewing that the vessel, a fortnight before, was in safety? [*Parke, B.*—The difficulty is, that the plaintiff was apprised that the two vessels were in safety together, one of them having arrived five days before. That might lead to a suspicion that something was amiss.] The storm itself would be sufficient to account for the difference in the times of their arrival. *Kirby v. Smith* is distinguishable from the present case. There, a vessel sailed from Elsinour on her voyage home six hours before the owner, who followed on the same day in another vessel, and having met with rough weather on his passage, arrived first, and then caused an insurance to be effected on his

(a) 1 B. & Ald. 672.

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ship: it was held that these circumstances were material to be communicated to the underwriters, and that it was not sufficient to state merely that the ship was "all well at Elsineur on the 20th July," the day she sailed. There the vessel was a missing ship at the time the policy was effected, for it appeared that she sailed on the 20th July, and the policy was effected on the 9th August, whereas the average duration of the voyage was only eight or ten days at most; and the fact concealed would have shewn that the one vessel was exposed to six hours more of tempestuous weather than the other. The natural conclusion from the statement made to the underwriters would be, that she did not sail on the same day on which the other vessel did. Here the day of sailing was communicated; it was known that the most dangerous part of the voyage was over, and the only fact not communicated was, that the ship was seen on the high road to the port of London.

Sir *F. Pollock*, and *R. V. Richards*, contra.—The argument on the other side proceeds on the fallacious assumption that the extra premium was taken because the vessel was *known* to have been exposed to the storm; when it was taken merely for the *chance* of her having encountered it. If it had been *known* that she had been exposed to it, and known also that the one vessel had arrived and the other not, the insurance could not have been effected on any terms. The fact not communicated was not merely, as it is said on the other side, that the ship was seen on the high road to London, but that the captain of the *Fruiter*, *who had arrived five days before*, had seen her. It is true the underwriters knew when the vessels sailed, and that the *Fruiter* had arrived; but they did not know that both were off Oporto together, having then completed two thirds of the voyage. The present is even a stronger case in favour of the insurers than *Kirby v. Smith*; if the voyage

had been only from Oporto to London, that case would have been identical with the present. The vessel here was a missing ship, not indeed with reference to the whole voyage from Malaga, but with reference to that from Oporto, which, as the plaintiff knew, was all she had to perform. Suppose a vessel from the East Indies had been seen off Oporto six weeks back, would she not be a missing ship for the purpose of that voyage? It is no answer to say that the communication would have shewn that the vessel had escaped the main risks of the voyage: the assured is bound to give the latest and fullest information he has received respecting the voyage—it is his duty to communicate its whole history, as far as it is material to the risk; and the risk must not only not be greater, but it must be *the* very risk contracted against. The effect of the communication might be to shew that the greatest part of the danger was over as regarded the whole voyage, but not as regarded the voyage between Oporto and London. The plaintiff knew that it had ceased, with respect to both the ships, to be a voyage from Malaga to London, and had become a voyage from Oporto to London, and that the one had arrived safely five days before. The storm may be laid out of the question altogether for the purpose of the present argument; possibly the vessel was out of it; but the increased premium was taken for the chance of her having been in it. The question of materiality is certainly for the jury; but they must take a reasonable view of the facts, and if they form an erroneous conclusion on the point, the Court will send the case to a new trial; *Bridges v. Hunter* (a).

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LORD ABINGER, C. B.—As the defendant must pay the costs of a new trial, and as it is at least doubtful whether the point now urged, of the voyage from Oporto to London

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becoming material, and that from Malaga to London ceasing to be so, was brought under the consideration of the jury, we think the defendant should have another opportunity of contesting that point. If the additional risk arose from the storm alone, the underwriters certainly took a good premium for that risk. I will not say, however, if the time of the voyage from Oporto to London turned out to be considerably more than the average length, that the jury, under all the circumstances, might have come to the same conclusion. My brother *Parke* seems to think that the fact of the arrival of the other vessel so long before, both vessels having been together off Oporto, of itself makes a difference in the case. As the defendant must pay the costs, it may be as well, therefore, that he should have a new trial. The storm will then be out of the question, because the point now pressed is, that the fact of the one vessel having arrived so long before the insurance was effected varied the risk. That point certainly was not put to the jury, at least not through me. The jury may consider even that risk covered by the extra premium taken by the underwriters.

PARKE, B.—I think that question should be submitted to the jury.

The other Judges concurred.

Rule absolute on payment of costs.

ATTWILL v. BAKER.

Where a rule
for setting aside
the issue and
notice of trial,

on the ground that the former was delivered as for trial at the sittings, and the latter before the Secondary, was drawn up on reading the Judge's order for trial before the Secondary, the Court took judicial notice that it was an order in the cause, though that was not stated in the affidavits.

HUMFREY had obtained a rule nisi for setting aside the issue and notice of trial in this cause for irregularity,

on the authority of *Ward v. Peel* (a); the plaintiff having delivered an issue in the ordinary form, as for trial at the sittings, and a notice of trial before the Secondary.

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Lumley, who shewed cause, objected that it did not sufficiently appear that there was any Judge's order for trial before the Secondary; the affidavit in support of the rule stating only that the issue and notice of trial had been delivered. The issue, therefore, was not shewn to be irregular, although the notice of trial was certainly bad.

Humfrey answered, that the rule was drawn up on reading the Judge's order, and the Court would therefore take judicial notice that it was an order in the cause.

PARKE, B.—That is sufficient.—The plaintiff may amend on payment of the costs of this application.

Rule discharged accordingly.

(a) 1 M. & W. 743.

WALLIS v. DAY and Another.

COVENANT on an indenture, dated the 8th July, 1830, made between the plaintiff of the one part, and the defendants of the other part, whereby the defendants, for

The plaintiff,
by deed, sold
to the defen-
dants his trade
and business
as a carrier

between London and Wisbech, and, in consideration of the covenants therein contained on the defendants' part, covenanted with them that he would not thenceforth, during his life, exercise the trade of a carrier, except as thereafter mentioned; and that he would thenceforth, during his life, faithfully serve the defendants as an assistant in the trade of a carrier: and the defendants, in consideration of the before-mentioned covenants, and of the plaintiff's faithful service as aforesaid, covenanted to pay him a certain weekly sum for his life. In an action against the defendants on this covenant:—*Held*, that the plaintiff's covenant to serve during his life was good in law, and that the covenant in restraint of his trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on in any other way than as an assistant to the defendants.

Quære, whether, supposing this covenant were void, as being in general restraint of trade, the plaintiff could nevertheless have sued on the defendants' covenant to pay?

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the considerations therein mentioned, covenanted with the plaintiff to pay him for fifteen years the weekly sum of 2*l.* 3*s.* 10*d.* The declaration alleged as a breach that there was due to the plaintiff the sum of 39*l.* 9*s.* of such weekly payments, for eighteen weeks ending on the 22d October, 1836. The defendants demurred, after craving oyer of the indenture, by which, after reciting that the plaintiff had for many years carried on the trade of a carrier from London to St. Ives and thence to Wisbech, and had agreed with the defendants for the sale or relinquishment to them of his trade or business, on the terms and conditions thereafter expressed; it was witnessed, that in pursuance of the covenants, stipulations, and agreements, thereafter contained on the part of the defendants, the plaintiff sold, assigned, and relinquished to the defendants all the goodwill and interest which he, the plaintiff, had in or concerning the said trade or business as a carrier, as the same had been and then was carried on, and exercised and enjoyed by him, and all his estate and interest therein. And the plaintiff, for the considerations thereinbefore expressed, and in consideration of the covenants thereafter contained on the part of the defendants, covenanted with the defendants, that he would not, at any time from thenceforth during the term of his natural life, either by or for himself, or for or with any other person or persons whomsoever in trust for him, or to or for his use, benefit, or advantage, set up, exercise, or in any sort or manner howsoever use or follow the trade or business of a carrier, except as thereafter was excepted, and that the plaintiff should and would from thenceforth during his life well and faithfully serve the defendants as an assistant in the said trade or business of a carrier, &c. And the defendants, for the considerations before expressed, and in consideration of the covenants thereinbefore contained, and of the good and faithful service of the plaintiff as aforesaid, covenanted with the plaintiff that they would pay or cause to be paid to him, for the term

of fifteen years from the date thereof, the weekly sum of 2*l.* 3*s.* 10*d.*, and for the remainder of his life, if he should be living at the expiration of the term of fifteen years, the weekly sum of 1*l.* 8*s.* 10*d.* The indenture then contained a proviso for referring disputes touching the plaintiff's conduct to arbitration.

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Joinder in demurrer.—The grounds of demurrer stated in the margin were, that the indenture was void as being in restraint of trade, the plaintiff being prohibited from exercising the trade during his life, and everywhere, instead of the prohibition being confined to a particular district, or the line of road of the defendants, or to the period during which the defendants or either of them should continue to exercise the trade: That it did not appear that there had been actual service rendered by the plaintiff to the defendants: and moreover, that the weekly sum being entire, and one of the considerations for the payment thereof being invalid, the contract was wholly void.

Kelly, in support of the demurrer.—The covenant whereby the plaintiff engages not to exercise his trade during his life, being in general restraint of trade, is void; and inasmuch as it forms a part of the entire consideration for the defendants' covenants, they are avoided also. It is not necessary to argue that the declaration is bad for want of an allegation that the service has been performed: the general allegation that the plaintiff has performed all he was bound by his contract to perform may be sufficient to meet that objection, and as the covenants are independent, even if the defendants had pleaded that the plaintiff had performed no service, it would have been no answer to the action. It is not the case of a *condition*, but of an affirmative covenant entered into in consideration of several covenants on the other side, one of which is negative; and therefore, although the negative covenant be

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broken, the affirmative covenants must be performed. *Hunlocke v. Blacklowe* (a). And so, on the other hand, the performance of the service will not entitle the plaintiff to recover, unless he be entitled otherwise. No question, therefore, arises on the performance or non-performance of the service. But one of the considerations for the defendant's covenant to pay being in restraint of trade, the covenant is not binding. It is true, the contract being by deed, no consideration need be shewn for it; but it being stated in the deed, and averred in pleading, that it was entered into for various considerations, if one of them cannot be enforced, the contract is avoided. Now this being an absolute contract, binding the plaintiff not to carry on trade for his whole life, not limited in point either of time or place, is void as against public policy, and on the authority of all the cases. [Lord Abinger, C. B.—Can you shew any case, except where the prohibition was attempted to be enforced? I should require a strong authority to say, (although the prohibition would not be binding as against the party himself), that, there being nothing *criminal* in the contract, he should not have the benefit of it, where he has in fact performed it.] It cannot make any material distinction whether the question arises in the one form or in the other; the cases go to the extent that the restraint is *illegal*, and therefore not binding. If it be illegal in itself, and therefore void, how can the other covenant stand which is founded on it? This is a case quite different from that of a matter merely prohibited by statute: the ground on which the principle proceeds is not merely that the prohibition is personally injurious to the individual, but that it is prejudicial to the public, and therefore that the contract is avoided altogether. *Mitchell v. Reynolds* (b), *Chesman v. Nainby* (c), *Homer v. Ashford* (d), *Young v.*

(a) 2 Saund. 155 a.

(b) 1 P. Wms. 181.

(c) 2 Stra. 739.

(d) 3 Bing. 322; 11 Moore, 91.

Timmins (a). Those authorities shew that even a *partial* restraint of trade is void, unless it clearly appear that there is an adequate consideration to support it. Here every covenant is absolute. Suppose the defendants left off trade altogether, the plaintiff would yet be bound to remain idle for the rest of his life, depending on them for this small allowance. So, if they became bankrupts, or otherwise unable to pay it him, yet he—his covenant being absolute and independent—is still precluded from carrying on his trade for his own support. The consideration is therefore bad for inadequacy, because it is oppressive on the plaintiff, and places him at the mercy of the defendants' circumstances. *Horner v. Graves* (b) is directly in point. There the defendant, a dentist, covenanted, in consideration of receiving from the plaintiff professional instruction and a salary determinable at three months' notice, not to practise within a district of two hundred miles in diameter; and this covenant, though limited, was held unreasonable and void. Again, suppose the defendants were by any means prevented from having the benefit of the plaintiff's services, or that, although personally continuing his services, he carries on business for himself in the name of another person, using his own means and connexion—are the defendants, nevertheless, to continue to pay him the allowance? [*Parke, B.*—The failure of consideration is nothing, in the case of a contract under seal; you can only rely on the ground that the covenant not to trade is against public policy, and therefore void. No doubt, if it is a consideration for any part of this weekly payment, you cannot say for what part.] The argument is not that there is no consideration for the covenant to pay, but that the consideration is a bad one, in contravention of the policy of the law, which vitiates, therefore, any contract that is founded upon it.

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(a) 1 C. & J. 331.

(b) 7 Bing. 735; 5 M. & P. 768.

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Wightman, contra.—It being admitted that the covenants on either side are absolute and independent, the plaintiff is entitled to recover on this independent covenant for the payment of money, even though the covenant in restraint of trade be void. There is a known distinction between contracts illegal by statute, and illegal at common law: in the former case, the whole contract is void; in the latter, a covenant, if independent, may be enforced, although part of the consideration for it be bad. *Pigot's case* (a), *Norton v. Simmes* (b), *Fetherston v. Hutchinson* (c), *Newman v. Newman* (d), *Greenwood v. Bishop of London* (e). Here the defendants' covenant is so independent, as to give the plaintiff a right to declare upon it per se. It is the same thing as if it stood simpliciter as a covenant for payment of money, without reference to any consideration whatsoever. Although, therefore, there may be one of the plaintiff's covenants which the defendants cannot enforce against him, he is entitled to recover. All the cases referred to on the other side were actions to enforce the illegal covenant itself.

But, secondly, the plaintiff's covenant is legal. The result of the authorities is, that contracts in abstract and general restraint of trade are bad at common law, as being contrary to public policy; but that a partial restraint may be good, if founded on an adequate consideration. There is no decision as to the particular kind of qualification which is necessary, though generally it has consisted in a limitation of time or place; but *any* qualification is sufficient. Now here, there is no absolute restraint of trade on the part of the plaintiff; he is only limited as to the *mode* of carrying it on, viz., that he is bound to carry it on as an assistant to the defendants. The public may still have all the benefit of his talents

(a) 11 Rep. 27, b.

(b) Hob. 14.

(c) Cro. Eliz. 199.

(d) 4 M. & Sel. 66.

(e) 5 Taunt. 727.

and skill, and he may possibly carry it on in the manner most beneficial to himself, since he might not have capital to trade on his own account. Is there then any inadequacy in the consideration? On the contrary, he is to be provided for in a manner which he considers sufficient, for the remainder of his life. [Lord Abinger, C. B.—In partnership agreements, nothing is more common than to stipulate that neither party shall carry on trade except as a partner.] So in contracts of apprenticeship, it is every day's practice to stipulate that the apprentice shall not work for anybody else. There is no principle which says that a man shall not be restrained from being a *master* trader; it is the disabling a man from exercising his talents in trade at all, which is contrary to public policy. *Young v. Timmins* is the nearest case to the present. There the undertaking of the defendants was to employ the party *as theretofore*, and it appeared that this might relieve them from employing him at all; and therefore the Court said that it was an inadequate consideration for his engagement not to work for any other person. But here, the plaintiff may carry on his trade for the defendants' benefit, and they are bound for his whole life to pay him the weekly sum agreed upon.

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Kelly, in reply.—It is very doubtful whether the agreement of the plaintiff to serve for life is good in law. He thereby binds up his hands from all means of improving his condition, and obtaining the reward of his skill and industry, whatever profits he may be the means of making for the defendants. But however that may be, it cannot be said that a service to another, at a weekly payment, is a carrying on of trade; otherwise the question never could have arisen, since in every case the party has for some time been serving somebody. It is not being such a trader as will enable the plaintiff to increase the commerce of the country, or, except in a limited and definite degree, pro-

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cure credit or profit to himself. Moreover, this is clearly a prohibition to carry on trade *in any way*, anywhere in England except on the particular line of road specified. As to the distinction taken between acts prohibited by statute and at common law, it is said in *Mitchell v. Reynolds*, that restraint of trade is in direct infringement of Magna Charta. But the distinction does not apply to anything which is void as being contrary to public policy. No doubt, where the contracts are separable, and one of them can be ascribed to a lawful consideration, that may be enforced; but here they are not separable: it is a covenant to pay one entire weekly sum of money in consideration of several different things, one of which is bad.

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

LORD ABINGER, C. B.—This was an action of covenant on an indenture, by which the defendants bound themselves to pay the plaintiff a weekly sum during his life. It appeared from the indenture, which was set out on oyer, that the plaintiff had been a carrier between London and Wisbech, and that the defendants contracted with him to purchase the goodwill of his business, and to take him into their service at a weekly salary; and the plaintiff covenanted with the defendants to refrain from carrying on the business of a carrier during his life, except as therein mentioned, and to serve them faithfully in that business for his life. The defendants demurred, on the ground that this covenant, being in restraint of trade, was illegal, and that therefore the whole contract was void. I cannot however accede to that conclusion. If a party enters into several covenants, one of which cannot be enforced against him, he is not therefore released from performing the

others. And in the present case, the defendants might have maintained an action against the plaintiff for not rendering them the services he covenanted to perform, there being nothing illegal in that part of the contract. It was urged, however, that as the contract is to serve for life, it is illegal. There is no authority for that position, and I know of no principle that makes it so; on the contrary, my brother *Parke* has referred me to a case in *Viner* (a), in which it is laid down, that in order to maintain an action against a person who contracts to serve for life, the contract must be by deed. The judgment of the Court in favour of the plaintiff is sufficiently sustained by the authorities that were cited in the course of the argument, and especially the case of *Mitchell v. Reynolds*. The rule of law is, that a contract in general restraint of trade is void, as being against the policy of the law; but if the contract be made on sufficient consideration, and the public gain some advantage, it will be good. Suppose a man engaged in trade is desirous, when old age approaches, of selling the goodwill of his business—why may he not bind himself to enter into the service of another, and to trade no more on his own account? So long as he is able, he is bound to render his services; and it cannot be said to be a contract in absolute restraint of trade, when he contracts to serve another for his life in the same trade. On these grounds, we think there is a sufficient consideration to take this case out of the general rule of law.

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Judgment for the plaintiff.

(a) 15 Vin. Abr. 323; Master and Servant, (N) 5.

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JOSEPH PALMER *v.* JARMAIN.

If a party, authorized by the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, does get it discounted, but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received.

TROVER for a bill of exchange for 18*l.* 16*s.* 6*d.*, dated the 13th October, 1835, drawn by the plaintiff upon and accepted by one John Palmer, payable to the plaintiff or his order two months after date, and indorsed by the plaintiff. Plea, as to the converting and disposing of the said bill of exchange, that heretofore, and whilst the plaintiff was possessed of the said bill, to wit, on &c., he the plaintiff applied to and requested the defendant to get the said bill discounted for the plaintiff, which the defendant then agreed to do, and the plaintiff then delivered the same to the defendant for that purpose, and further requested him, after he should have got the said bill discounted, to take up and pay out of the proceeds a certain other bill of exchange for the sum of 9*l.* 7*s.* 6*d.*, then in the hands of one T. W. D.; and the plaintiff then further directed the defendant to deduct the sum of 2*l.* from such proceeds for his trouble, &c., and the sum of 1*l.* 5*s.* then due from the plaintiff to the defendant, and afterwards to hold the balance, after making such payment and deductions, for the plaintiff. The plea then proceeded to aver, that the defendant did get the bill discounted, and made the above-mentioned payment and deductions out of the proceeds, and held the balance for the plaintiff. The plaintiff replied to this plea, admitting that he requested the defendant to get the bill discounted, but denying that he authorized him to make the payment or deductions mentioned in the plea; but alleging, on the contrary, that he directed him to pay over the whole of the proceeds to him, the plaintiff. To this replication there was a special demurrer, on the grounds, that it admitted that the defendant did not convert the bill; that it tendered an immaterial issue; and that it was a departure from the declaration. Joinder in demurrer.

Butt was about to argue in support of the demurrer, but no counsel appeared to support the replication. *Esch. of Pleas,*
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LORD ABINGER, C. B.—The facts alleged in the plea, and admitted by the replication, shew that the action should have been for money had and received.

PARKE, B.—The defendant does nothing with the bill which he was not authorized to do; but having disposed of it, and made it the property of another, which he had a right to do under the authority given him by the plaintiff to get it discounted, if he has misapplied any part of the proceeds, he must be sued for the amount as money had and received.

Judgment for the defendant (a).

(a) See *Stierneld v. Holden*, 4 B. & Cr. 5.

HILL v. ALLEN.

ASSUMPSIT on an attorney's bill, with counts for money paid, and on an account stated. Pleas, first, non assumpsit; secondly, that the sums of money in the second and third counts mentioned, and therein respectively alleged to have been due by the defendant to the plaintiff for money paid by him for the use of the defendant, and for money found due from the defendant to the plaintiff on an account stated between them, were monies expended by the plaintiff, and charges made by him, for and in respect of the work and labour, care, diligence, journeys and attendances in the first count mentioned, and therein alleged to have been performed and bestowed by the plaintiff as the attorney and solicitor of and for the defendant; and the defendant says, that, in the performing and bestowing of the said work and labour, &c., the plaintiff, as such at-

A special plea to an action on an attorney's bill, which sets up as a defence that the plaintiff conducted the business so negligently and unskillfully as to be useless to the defendant, —or, that it was done under an indemnity from the plaintiff against costs and expenses,—is bad on special demurrer, as amounting to the general issue.

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torney and solicitor, conducted himself so negligently, carelessly, unskilfully, and improperly, that the same became and were wholly ineffectual and useless to him the defendant. Verification.—Third plea, that the defendant is an illiterate person, wholly unacquainted with the legal requisites to entitle any person to strike a docket against another, or with the legal consequences of such a proceeding; and that the plaintiff being an attorney, learned in the law, and well knowing the premises, on the 26th May, 1835, advised him, the defendant, that by virtue of a certain promissory note then in his possession, he was legally entitled to strike a docket against one J. H., and requested him to strike the said docket, and to authorize the plaintiff to act as the attorney of him, the defendant, in that behalf, and promised him, if he would strike such docket, to indemnify him from all costs, damages, and expenses occasioned thereby, and to take care that he should incur no risk or loss in any way; and the defendant says, that he, relying upon the said advice and promise of the plaintiff, did, under his advice, and by and through his agency as the attorney of him the defendant, strike the said docket; and that the said several sums of money in the declaration mentioned, and therein supposed to be due from him to the plaintiff, are costs, damages, and expenses occasioned by striking the said docket. Verification.

To these two latter pleas the plaintiff demurred specially, on the ground that they amounted only to the general issue; and the defendant joined in demurrer.

Lumley, in support of the demurrer, was stopped by the Court.

M^r Mahon, contra, urged that the third plea at all events was a plea in confession and avoidance, since it admitted that work was done by the plaintiff as the defendant's attorney, which was beneficial to the defendant,

but avoided it by setting up a counter-contract; which, for avoiding circuity of action, was allowable. [*Parke, B.*—It comes to the same thing as the second; that the plaintiff has not performed such services as entitled him to be paid. *Lord Abinger, C. B.*—The defendant's answer is, I made no such promise as you allege, because you indemnified me.] But the plea discloses also that the defendant was induced to enter into the contract by the fraudulent misrepresentation of the plaintiff; if so, it ought, under the new rules, to be pleaded specially.

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LORD ABINGER, C. B.—The plea is, that the defendant made no such contract at all as is declared upon. Both pleas are clearly bad.

PARKE, B.—So far as relates to this action, it amounts to an agreement by the plaintiff to give his services for nothing. The defendant denies that there ever was a contract in respect of which he was bound to pay the plaintiff money on request.

BOLLAND, B., and GURNEY, B., concurred.

Judgment for the plaintiff (a).

(a) See *Courins v. Paddon*, 2 C. ib. 333; *Jones v. Reade*, 1 Nev. & M. & R. 547; *Grounsell v. Lamb*, P. 18.
1 M. & W. 352; *Jones v. Nanney*,

CASLEY v. BINNS.

J*ERVIS* (on the 27th January), shewed cause against a rule nisi for an attachment against the sheriff of Middle-
Whenever it appears, on the discussion of a motion to set aside a regular bail-bond or attachment, that the plaintiff has been prevented from trying his cause by the irregularity of the defendant's proceedings, he is entitled to have the bail-bond or attachment stand as a security, although it appear that the rule to set it aside might have been disposed of in time to allow the plaintiff to enter and try his cause at the regular time.

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sex for not bringing in the body. The arrest was on the 31st December; on the 5th January the sheriff was ruled to return the writ; on the 7th bail was put in; on the 11th notice of exception was given; and on the same day the plaintiff declared *de bene esse*, laying the venue in London. The last term sittings in London were on this day, the 27th. On the 13th, notice of justification of bail was given for the 16th, on which day the body rule expired. Two persons were proposed as bail, one of whom having fallen ill, on the 16th application was made for further time to justify, and four days' time was given, on payment of costs, and on putting the plaintiff in the same situation. On the 18th a fresh notice of justification was given for the 20th; but in the meantime the defendant's attorney found that the bail was too ill to come up to justify; and on the 20th the defendant was rendered, and at three o'clock on the same day notice was given to the plaintiff's attorney of the render. On the 21st the plaintiff obtained the present rule.—The first question was, whether the render was in time. Now the object of the body rule being to compel the defendant to justify or render, either of which gives the plaintiff the same security, the order for further time should be construed as giving time to render as well as justify. The render is *de facto* the same as putting in bail.

[It being stated on the other side, however, that the costs had not yet been paid, *Jervis* admitted that he could not discharge the rule on this point, except on payment of the costs of the former order and of this application.]

The next question is, whether the attachment is to stand as a security. The body rule enlarges the time for perfecting bail. The declaration *de bene esse* is not complete until bail is perfected; the defendant would therefore have been entitled to four days from the 16th for pleading; that would carry on the time until the 20th; then the eight days' notice of trial would have carried the plaintiff over the sittings of this term.

Humfrey, contra.—When the defendant perfects bail, the four days run, not from the 16th, the date of the expiration of the body rule, but from the 11th, the date of the declaration de bene esse. [*Parke* B.—Do not you stand in the same situation as if you had issued your attachment on the 21st, instead of obtaining a rule nisi merely? In that case the defendant would have applied on the 22d to set it aside on payment of costs; that rule would have been disposed of at all events on the 25th, and you would have been in time to enter your cause for trial to-day.] The question is not when the rule would or would not have come on to be discussed, but whether, by the irregular proceedings of the defendant, the plaintiff has been prevented from going to trial. Rule V. of H. T. 2 W. 4, directs, that upon staying proceedings on an attachment against the sheriff for not bringing in the body, the attachment shall stand as a security, if the plaintiff shall have declared de bene esse, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable, and in a country cause, at the ensuing assizes. The only question in this case is, whether, supposing both parties had been regular throughout, and there had been no application on either side, the plaintiff could not have tried at these sittings: otherwise it would depend, not on the regularity of the plaintiff's proceedings, but on the time when the defendant comes to shew cause against the rule for an attachment, whether the plaintiff has lost a trial. The object of the rule is, that the attachment shall stand as a security, if by the defendant's irregularity he has prevented the plaintiff from trying,—whenever the rule for an attachment is disposed of. Suppose this were a country cause, and bail ought to have been put in on the last day of Term, which would enable the plaintiff to try at the ensuing assizes; and on the first day of the next

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Term the defendant comes to set aside an attachment on payment of costs; would it depend on the question when that rule was disposed of, whether the plaintiff had lost a trial?

PARKE, B.—The reference to the second part of the rule certainly shews that your construction of the first branch of it is the right one. The question does not depend on the time when the rule for an attachment is discussed, but on the *fact* whether, if the defendant had been regular, the plaintiff could have gone to trial. If by the default of the defendant the plaintiff has been prevented from trying his cause, the attachment is to stand as a security.—The rule will be discharged on payment of the costs of the order for further time, and of the present application.

The rest of the Court concurred.

Rule discharged accordingly.

WHITE v. FARRER.

Where the date of the writ of summons was untruly stated in a writ of trial, the Court set aside a verdict which the plaintiff had recovered thereon, the defendant not having appeared at the trial.

SWANN had obtained a rule nisi to set aside the verdict found for the plaintiff in this case, which was tried before the under-sheriff of Middlesex on a writ of trial, on the ground of several alleged irregularities, one of which was, that the writ of summons was not truly stated in the writ of trial, inasmuch as it was alleged to have been sued out on the 13th September, whereas it was in fact issued on the 30th. The defendant did not appear at the trial.

Hindmarch shewed cause, and urged that the application ought to have been to set aside the writ of trial, and not the verdict.

PARKE, B.—The writ is void, and all the proceedings under it are therefore irregular; and the irregularity has not been waived. The rule must be absolute.

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Rule absolute (a).

(a) See *Whipple v. Manley*, 1 M. & W. 432.

REX v. ATKINS.

THIS was a scire facias at the suit of the Attorney General, on behalf of the Crown, to recover from the defendant the sum of 1000*l.*, being the penalty of a bond given by the defendant and his surety to his late Majesty King George the Fourth, and executed on the 22d March, 1830. The defendant pleaded performance in the terms of the condition, and the Attorney General replied, assigning several breaches, upon which, in the rejoinder, issues were joined.

On the trial before the Lord Chief Baron, at the Middlesex sittings after last Easter Term, a verdict was found for the Crown, and subsequently, upon a motion in arrest of judgment or for a new trial, it was ordered that the opinion of the Court should be taken upon the following case:—

On the 22d day of March, 1830, the defendant, then and still being an agent for the entry and clearance of goods at the Custom-House, executed, with his surety, to his late Majesty King George the Fourth, a bond in the penal sum of 1000*l.*, subject to the following condition:—
“Whereas the above-bounden George Atkins has applied to the Commissioners of his Majesty’s Customs in England, for a licence to enable him to act as an agent for transacting business at the Custom House in London, which licence the said Commissioners have been pleased

Licences granted by the Commissioners of Customs to custom-house agents, under the 6 Geo. 4, c. 107, s. 139, and bonds taken for the faithful performance of their duties, are continued in force by the 3 & 4 Will. 4, c. 53, s. 144, notwithstanding the repeal of the former act by the 3 & 4 Will. 4, c. 50.

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to grant, in pursuance of the authority vested in them by an act of the sixth of George the Fourth, c. 107: Now the condition of this obligation is such, that if the above-bounden George Atkins, and any clerk whom he may appoint to act for him in the manner prescribed by the said act, shall at all times *during the continuance of the said licence*, conduct themselves faithfully and incorruptly, and do not nor shall wittingly or willingly do or commit any act, matter, or thing prejudicial to his Majesty in his customs or other duties, and if the said licence shall not be lent, sold, or otherwise disposed of, or made use of by any other person than the above-bounden George Atkins, and shall be delivered up to the said Commissioners within seven days after notice of the revocation of the said license, or within two months after the decease of the above-bounden George Atkins, or within two months after he shall cease to act as such agent, then this obligation to be void, otherwise to be and remain in full force and virtue."

When this bond was executed, the statute 6 Geo. 4, c. 107, was in force, and no other bond was executed by the defendant from that time until the proceedings were instituted upon which the present question arises.

On the 28th August, 1833, the statutes 3 & 4 Will. 4, chapters 50, 51, 52, 53, 55, 56 and 57, received the Royal Assent. By the first of these statutes the 6 Geo. 4, c. 107, was repealed.

On the 30th August, 1834, the defendant, as agent of Richard Gerard, the importer, took out a bill of sight for four cases of merchandize, further particulars unknown, being in the ship Belfast, then lying in the river Thames, from Calais; and under the bill of sight the four cases were examined, and found to contain foreign goods, and were warehoused by the defendant, as agent for Richard Gerard, for exportation only, without the payment of any duty, according to the provision contained in the last-mentioned act of parliament.

Two of the cases were marked D. B. and V. B., and upon the 11th of September an entry was passed by the defendant for the exportation of these two cases. Under colour of this entry the defendant attempted to export two other cases, similar in appearance, but which, being examined by the officers of his Majesty's customs, were found to contain goods of British manufacture. The bonded cases containing the foreign goods were afterwards removed from the warehouse, and the regular duties of importation were paid on such goods.

Either party was to be at liberty to refer to the pleadings, a copy of which accompanied and was to be taken as part of the case (a).

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(a) The first breach alleged, that after the making of the said writing obligatory, and during the continuance of the licence therein mentioned, and whilst the said George Atkins was and acted as such licensed agent as therein mentioned, and before the suing out of the writ of sci. fa., to wit, on the 30th day of August, 1834, divers, to wit, two cases containing divers goods and merchandize, i. e. 193 pieces of blond lace, &c., were, according to the purport and effect of the act of parliament in that case made and provided, entered by bill of sight by the said George Atkins, as such licensed agent as aforesaid, for importation from parts beyond the seas, to wit, from Calais, into the united kingdom of Great Britain, and were afterwards, to wit, on &c., landed, to wit, at &c., and a full entry thereof duly made, &c. &c.: That certain duties of customs were due and payable upon and in respect of

the said goods and merchandize on the importation thereof, according to the provisions of the act of parliament, that is to say, the sum of 150*l.*—It then alleged the warehousing of the goods without payment of the duties, the entering of them outwards for exportation, &c. &c.; and that, during the continuance of the licence, and while the defendant was and acted as such licensed agent as aforesaid, to wit, on &c., two other cases, containing other goods and merchandize, to wit, &c., not being subject to the payment of any duties of customs on the importation thereof, were knowingly and illegally, and with intent to defraud his Majesty of his customs, waterborne to be put on board ship for exportation, with the knowledge and consent and by the contrivance of the defendant, with an intent to prejudice his Majesty in his said customs, contrary &c.; and that, by means of the premises,

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The questions for the opinion of the Court were:—

First,—Whether the above bond could now be put in force.

Secondly,—Whether the goods warehoused for exportation only were subject to the payment of duty as described in the pleadings.

If the Court should be of opinion in the negative of either of the above questions, the verdict was to be entered for the defendant; but if in the affirmative of all the above questions, then the verdict was to be entered for the Crown.

Barlow, for the Crown.—The first question in this case is, whether the bond and the licence remained in force after the repeal of the 6 Geo. 4, c. 107. First, the bond and license might be good, although no act of parliament had existed having reference to licensed agents. Secondly, they might remain good notwithstanding the simple repeal of the act under which they were taken, if not inconsistent with any of the provisions of the subsequent acts; but thirdly, the 3 & 4 Will. 4, c. 53, did in fact adopt and protect all licences and bonds granted under the former acts.

First.—The Commissioners of Customs had power, without reference to any act of parliament, to grant licences to any individuals to act as agents. Such a licence

the defendant conducted himself in that behalf, as such licensed agent, unfaithfully and corruptly, and willingly and wittingly did and committed a matter prejudicial to his Majesty in his customs aforesaid, contrary to the true intent and meaning of the condition of the said writing obligatory, and of the statute, &c. The other breaches did not differ in any point material to be stated:

and the rejoinder was, that the defendant did not, by means of the premises in the breaches respectively alleged, conduct himself in that behalf, as such licensed agent, unfaithfully and corruptly, and did not wittingly and willingly do and commit a matter prejudicial to his Majesty in his customs, contrary, &c.: whereupon issue was joined.

would be a certain advantage to the party to whom it was granted, and would give him a species of credit; and the Commissioners would be entitled to require a bond for general good conduct in the party so licensed; and if he chose to execute such bond, he would have no right afterwards to say that it was not a valid one, or that no advantage was to be derived from the licence. It may be said this would be a restraint on trade: it is not necessary however to contend that the Commissioners could, except under the act, preclude any person from acting *without* a licence and bond, but they might well say that they would grant a licence to such persons as chose to enter into the bond, and receive the advantage which the licence might confer upon them. [Lord Abinger, C. B.—Independently of this act, the Commissioners would have the same authority that you or I have; their licence would be a mere nullity.]

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Secondly.—The bond and licence continue good, provided neither of them is inconsistent with the common law or the late acts of parliament. The 3 & 4 Will. 4, c. 50, amounts only to a simple repeal of the act of the 6 Geo. 4, and there is nothing in it expressly avoiding past licences or bonds; and there is no principle of law by which instruments of such a nature, granted under an existing act, cease to be of force immediately on its repeal, unless they be inconsistent with the law as it then stands. The cases which have been decided on the validity of securities granted by clergymen on their livings, during the repeal of the restraining statute of 13 Eliz. c. 20, are strongly in point. That statute was repealed by the 43 Geo. 3, c. 84, but was re-enacted by the 57 Geo. 3, c. 99. During the repeal, a clergyman created charges on his living, and after the 13 Eliz. came again into operation, he transferred those charges, having at the same time an additional advance of money; and it was held that notwithstanding the re-enactment of the statute of Elizabeth, such subsequent assign-

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ments were valid. *Doe d. Broughton v. Gully (a)*, *Doe d. Wilkes v. Ramsden (b)*. [Lord Abinger, B.—The difference is, that there was an interest in the living conveyed to another party, at a time when the act of parliament enabled a clergyman to convey it; that interest was not defeated by a subsequent act. This licence is a mere personal privilege.]

Thirdly, the 3 & 4 Will. 4, c. 53, did in fact adopt and protect all past licences granted to agents, and bonds taken from them by the Commissioners. Until the act of the 4 Geo. 4, c. 69, no licence or bond was required from a custom-house agent. The 46th section of that act, after reciting that it is expedient for the better security of the revenue, and of the merchants and traders, to establish regulations for restraining improper persons from acting as custom-house agents, enacts, “ That from and after the expiration of one calendar month next after the passing of that act, it shall not be lawful for any person to act as an agent for the transacting any business at the Custom-house as therein mentioned, unless such persons shall be authorized so to do by licence under the hands and seals of the Commissioners of Customs for the time being; and it shall be lawful for the said Commissioners, or any two of them, and they are thereby authorized and empowered, to grant any such licence to any person who may require the same; and in such case it shall be lawful for the Commissioners to require a bond to be given by every person to whom such licence shall be granted for the purpose of acting as such agent, with one sufficient surety, in the sum of 1000*l.*, conditioned for the faithful and incorrupt conduct of every such person, and of his clerk acting for him as therein provided, and to deliver up such licence, if the same should be revoked, within seven days after the notice of such revocation.”

(a) 9 B. & Cr. 344; 4 Man. & R. 249.

(b) 4 B. & Ad. 608.

Section 49 enables the Lords of the Treasury, by order in writing under their hands, to revoke licences granted according to the provisions of that act. How, therefore, could the bond cease to exist except by virtue of such revocation, or by its being surrendered and cancelled? Section 50 provides, that a copy of such order shall be delivered to the party, or left at his place of abode, and the licence granted to him shall thereupon be null and void: and section 51 imposes a penalty of 100*l.* on any party who shall act as a custom-house agent, not being licensed in manner authorized by that act, or whose licence shall have been revoked. Then sect. 55 provides, that no clerk or other person in the employ of any agent who shall be licensed under the authority of that act, shall act for him without a written appointment from such agent, nor unless such appointment shall by such clerk be produced to the Commissioners of Customs, and shall be allowed and sanctioned by the signatures of such Commissioners, or any one or more of them, for the time being. All these provisions are clearly prospective only. Then came the 6 Geo. 4, c. 107, which was in force when the bond in this case was given, and the terms of which are, as to this question, precisely the same as those of the 3 & 4 Will. 4, c. 53. Section 139 of that act provides, "That it shall not be lawful for any person to act as an agent for transacting business at the Custom-house, unless authorized so to do by licence of the Commissioners of Customs." A material difference between this act and the former is, that by the 6 Geo. 4, no interval of a month or other period is given before the licence is required; the inference is, that the act intended that the parties should go on under the old licences; otherwise the greatest inconvenience must arise, inasmuch as, until new licences were granted, no agent could act at all, and the business at the Custom-house would be altogether suspended. The section proceeds to enact, that "If any person shall act as such

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agents, not being so licensed," (not saying "licensed in manner authorized by that act," as in the 4 Geo. 4), he shall forfeit 100*l*. Section 140 enables the Lords of the Treasury, by order under their hand, to revoke *any such licence*—applying therefore in its terms to any existing licence. Section 142 contains a new provision as to the clerks of the agents; enacting, "That it shall not be lawful for any agent to appoint a person without licence to be his clerk in transacting such agency: provided, that no person shall be admitted to be such clerk, until his name and residence, and the date of his appointment, shall have been indorsed on the licence of the agent, signed by him, and witnessed by the signature of the collector and comptroller of the Customs; unless such person shall have been appointed with consent of the Commissioners of the Treasury, *before the commencement of that act.*" This clause clearly has the effect of protecting the clerks who had been appointed and approved under the former act. It follows therefore that the agents' licences must be protected also, for it would be absurd to suppose that the legislature intended to protect the clerks of the agents, and not the agents themselves.

The phraseology of the 3 & 4 Will. 4, c. 53, ss. 144—147, is the same as that of the above clauses of the 6 Geo. 4, c. 107, and the same arguments therefore arise upon it; except that, if it be held that the last act required fresh bonds and licences, the agents licensed under *both* the former acts will be without protection.

The argument on the part of the defendant, on the motion for this rule, was chiefly derived from a reference to other provisions of the acts of the 3 & 4 Will. 4, in which certain appointments, licences, and bonds are continued by express words; and it was thence inferred, that because *these* licences and bonds are not expressly kept alive, they expired with the repeal of the former act. It is necessary therefore to refer to those cases, and shew

that they do not furnish ground for such inference. Five different classes of cases were referred to. First, the 3 & 4 Will. 4, c. 51, ss. 5 & 9, expressly keep alive the past appointments of Commissioners and officers acting under them. That is because the second section of the same act, which authorizes the Crown to appoint Commissioners, and the sixth section, which provides for the appointment of inferior officers, are in terms prospective only. Secondly, the 3 & 4 Will. 4, c. 52, s. 94, protects past licences to lightermen; that also may be because the provision in the first part of the same clause—"that no goods shall be carried waterborne to be put on board any ship for exportation by any person, unless such person *shall be* authorized for that purpose by licence under the hands of the Commissioners of the Customs"—is prospective only. Thirdly, by the 3 & 4 Will. 4, c. 53, s. 26, the licences previously granted to boats and vessels are protected by express words. The 16th and 19th sections of that act may be referred to to explain the reason. Section 16 requires that vessels shall be rigged, &c. in a particular manner, and declares that they shall be forfeited unless the owners shall have obtained a licence from the Commissioners *in the manner thereafter directed*. And section 19 provides, that before any such licence shall be issued or have effect, the owners shall give security by bond for the single value of such vessel or boat, conditioned as therein mentioned. The phraseology of these enactments also is future only, and equally required a protecting clause for licences granted under the former acts. Fourthly, the Registry Act, 3 & 4 Will. 4, c. 55, s. 4, having declared that vessels are not to have the privileges conferred by that act unless they are registered, and have a certificate of registry *in pursuance of that act*; section 4 saves the privileges of vessels registered under the 6 Geo. 4, c. 110. Lastly, by the 3 & 4 Will. 4, c. 57, s. 4, past warehousing bonds are expressly protected; but a

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reason for this also is to be found in the provisions of section 2, that it *shall be* lawful for the Commissioners of Customs to appoint in what warehouses, &c. goods may be warehoused, and to direct in what cases security by bond, *in manner thereafter provided*, shall be required,—which clearly refers only to future bonds. In all these cases, therefore, good reason appears for the introduction of the protecting clauses; but even if that were not so, the argument drawn from them is by no means conclusive. But in one of the clauses referred to, the 3 & 4 Will. 4, c. 53, s. 26, there is a provision which may be construed to protect *all* bonds given in pursuance of any act relating to the customs.

The case of *Jones v. Woollam (a)*, which was referred to on moving for the rule, is an authority in point for the Crown. There the defendant gave a bond to the plaintiff as secretary of a friendly society, and being sued on it, objected that the rules of the society had not been enrolled pursuant to the act of parliament, and that therefore the bond could not be enforced; but it was held that the bond was good at common law, independently of the act of parliament, which had no reference to any bond.

As to the second question reserved for consideration, that appears to be sufficiently answered by the fact stated in the case, that duty was in fact paid on these goods. But at all events, in order to raise the point, the defendant ought to have pleaded that the goods were not liable to duty. [*Parke, B.*—He denies all the misconduct alleged in the breaches. If it was essential, in order to prosecute his offence, to shew that the goods were liable to duty, it was for you to prove it.] The *Attorney-General v. Key (b)*, which was relied on in support of this objection, is perfectly distinguishable. Here there is a distinct allegation that the goods were liable to the payment of duties on importation,

(a) 5 B. & Ald. 769; 1 D. & R. (b) 1 C. & J. 159; 2 C. & J. 2. 393; 2 Chit. 322.

and the fact appears that the duties were paid on them. Goods may be warehoused for exportation either under the 3 & 4 Will. 4, c. 56, s. 8, or the 3 & 4 Will. 4, c. 52, s. 60; in the former case such as are liable to duty on importation; in the latter, such as are allowed to be imported only to be warehoused for exportation, being prohibited sub modo.

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Welsby, for the defendant.—First, the bond is not enforceable at common law. The Commissioners of the Customs themselves derive all their authority from the statute, and at common law would have no right whatever to require either a licence or a bond. Nor can it be said that the licence confers a privilege, being accompanied by a bond, the smallest breach of which subjects the party to an absolute penalty of 1000*l*. At common law any person would have a right to assist in the importation of goods by any subject of the realm, and therefore, but for the authority of the act, the bond would be void as in restraint of the lawful occupation of the party. *Jones v. Woollam*, which applies to this part of the case, is distinguishable; that was a bond given for good consideration, and might well be supported without reference to the act of parliament, which contained no provision as to the taking of any bonds; this is a bond given by an officer who exists only under the authority of the statute, and which the Commissioners could take only in pursuance of that authority. But the condition of the bond expressly refers to the act of parliament, and it professes to be taken altogether in virtue of the authority thereby granted, and to exist only during the continuance of the licence; and all the replications allege that the breaches were committed during the continuance of the licence, and whilst the defendant acted as such licensed agent as in the condition mentioned. If therefore the licence has expired, the bond has expired also.

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Then, secondly, the licence did expire by the repeal of the 6 Geo. 4, c. 107. It is said that it continues in force if there be nothing in the new code inconsistent with it; but it is apprehended that, by the unconditional repeal of a statute, all instruments taken under it are also put an end to, unless it appears from the express words of the repealing act, or by necessary implication from its various provisions, that there was an intention to continue them. The cases referred to, as to the charges on clergymen's livings, do not apply. There the assignments were made at a time when no law existed to invalidate or restrain them, and rights were thereby transferred to third parties, which the Court held not to be affected by the subsequent re-enactment of the restraining act; but that is very different from a matter of mere fiscal regulation, which exists only by the authority of the act of parliament.

It was next argued, from a comparison of the provisions of the 4 Geo. 4, c. 69, with those of the subsequent acts, that the past licences and bonds were in fact saved by the statute now in force. The 4 Geo. 4 was unconditionally repealed by the 6 Geo. 4, c. 105, except as to arrears of duties and penalties. It is said that the terms of the former act are prospective only; but no valid distinction can be drawn in this respect between it and the subsequent acts, in each of which it is stated that the Commissioners are *thereby authorized* to grant licences: all instruments, under whichever act granted, exist only by its authority, and during its continuance, unless otherwise provided for. As to the argument drawn from the interval of a month given by the 4 Geo. 4, c. 69, s. 46, that appears to have been because otherwise there would have been no time for the necessary formalities, inasmuch as the act, for many purposes, came into operation immediately on its passing. But both by the 6 Geo. 4, c. 107, and the 3 & 4 Will. 4, c. 53, there is an interval between the passing of the act and the period of its coming into operation. [*Parke, B.*—

But the licences could not be granted until the act took effect.] There would at all events be time to prepare them.

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It is said that the proviso of the 147th section of the new act operated to protect previously existing clerks, and therefore it would be absurd to contend that it did not protect previously existing agents. But the effect of the proviso is merely this—that where the commissioners have previously made a satisfactory inquiry into the qualifications of a clerk appointed by them under the former act, it shall not be necessary to go through the formality of having his name indorsed on the licence; but it does not therefore follow that previously appointed clerks, or previous licences, continue in force without renewal. And there is a difference in the enactments of the 6 Geo. 4. c. 107, s. 141, and of the 3 & 4 Will. 4, c. 53, s. 148, which might have rendered it expedient to vary the terms of the licences. The latter act discontinues the privilege which the clerks in the Long Room had under the former, of passing entries. In the same manner, when by the 6 Geo. 4, c. 108, s. 23, a change was made in the law as to the licences granted to vessels and boats, a clause was introduced to save the existing licences; but on the passing of the act of the 3 & 4 Will. 4, no further change being made, no such protecting clause is to be found in it. Nor is this a question by what authority a licence can be *revoked*, when it is otherwise clearly in force; but whether it is in force at all by virtue of the act.

The answer given to the several cases referred to, in which existing instruments are saved by express words, is, that in those cases the words of the act creating them are prospective only, and therefore a protecting clause was necessary. First, with regard to the saving of past appointments of commissioners and their officers—it is said the 3 & 4 Will. 4, c. 51, s. 2, is prospective only, and therefore the saving in s. 9 was requisite. But if the act

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be prospective only as to the appointments of the commissioners, so must it be also as to all acts to be done by them; and if it was necessary to introduce a clause to keep alive their authority, so was it also to protect the instruments granted by them. But the same section also in express terms protects all *bonds* given by the officers and their sureties for good conduct. Next, as to the clause referring to licences for lightermen, 3 & 4 Will. 4, c. 52, s. 94. It is said that the provisions relating to them also are future only; but they are no more so than those of the clause now in question, which states that *it shall not be lawful* for parties to act as custom-house agents without licences, and that the commissioners shall be authorized to grant them. The same observation applies to the clause respecting licences to lightermen, 3 & 4 Will. 4, c. 26. And with regard to the argument drawn from the generality of the terms in that clause as to bonds, it clearly appears, by reference to the preceding section, that it applies only to bonds given in respect of licences granted for vessels or boats, for which only the legislature was then making provision. Again, the clause for the protection of vessels previously registered, under 3 & 4 Will. 4, c. 55, s. 5, is attempted to be explained by saying, that under that act not only registry but a certificate is required, and it was therefore necessary to make provision for the continuance of the privileges of vessels registered under the former act. But it appears, by referring to the preceding act, that the certificate was by it also made part of the registry; and it has been decided that a certificate under the former act would be sufficient. And lastly, the enactments as to warehousing bonds, under the 3 & 4 Will. 4, c. 57, s. 2, are no more future or prospective than the provisions relating to the present case.

The saving in the general repealing clause of the 3 & 4 Will. 4, c. 50, s. 2, furnishes a material argument in favour of the defendant. The exception is of all arrears

of duties or drawbacks which shall have become payable, or any penalty or forfeiture which shall have been incurred. If by that act the securities taken under the former act were saved, it could not have been necessary to provide for forfeitures incurred before the passing of the act; they would be saved along with the securities. And it appears, from the 4 & 5 Will. 4, c. 89, s. 29, that doubts had arisen as to the effect of the repealing clause of the 3 & 4 Will. 4, c. 50.

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Then, as to the second question raised in this case.—All the replications state that the goods were liable to the payment of duty on importation, and that in the course of their exportation, other goods not liable to duty were substituted for them, and the loss of those duties is charged as the injury accruing to the King in his customs by the act of the defendant. If it appears, therefore, that these particular goods, under the circumstances stated in the pleadings and disclosed in the evidence, were not liable to duties on importation, the injury alleged has not been committed, and there is a variance. Now, each of the replications states that the goods were duly warehoused, &c., for exportation, and sets forth all the proceedings on a regular and proper entry. But by the 3 & 4 Will. 4, c. 52, s. 60, goods cannot be entered for exportation only, unless they are prohibited, by reason of the place from whence they came, &c., from being imported for home consumption. It must be taken that there was no fraud in any part of the proceedings except where it is proved, and therefore that the goods were duly entered for exportation. If so, no duty attached upon them, and they are improperly described. If, indeed, any goods liable to duty on importation may be lawfully warehoused for exportation, that may be an answer to the argument.

Barlow, in repl., was stopped by the Court.

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Lord ABINGER, C. B.—This case resolves itself into two points. The first is, whether the licence is a continuing licence: if it is, then the bond also will continue; because, as the bond refers to the licence, supposing there was no act to authorize the taking of the bond, looking at the licence authorized by the act, as the commissioners have thought fit to take a bond for the due performance of the duties of licensed agent, it would be good at common law; therefore there is no occasion to consider whether it was good under the act of parliament.

The first question then is, whether the licence is a continuing licence. Undoubtedly some ambiguity has been raised by the immense labour taken to make the act clear. There was room for doubt in this case, but that doubt is sufficiently removed by Mr. *Barlow's* argument. I will only refer to one part of it, namely, that this licence is referred to in the last act as an existing licence; and it is sufficient for us, if we can find from the act—without shewing that the case is provided for in express terms—that it refers to it as a continuing licence, on which it is to operate. It appears that in the 4 Geo. 4, c. 69, there is a particular form prescribed for the licence, and also for the appointment of the clerks to the agents; the agent is to be licensed by the commissioners, and then his clerk is to be appointed: “It shall not be lawful for any clerk or other person in the service or employ of any broker or agent, who shall be licensed under the authority of this act, to act for such broker or agent without a written appointment from such broker or agent for such purpose, nor unless such appointment shall by such clerk be produced to the commissioners of customs, and shall be allowed and sanctioned by the signature of such commissioners, or any one or more of them, for the time being.” So that, under the 4 Geo. 4, the agent was to be licensed by the commissioners, and the clerk of the agent was to have his written appointment under the hand of the agent,

which was to be sanctioned by the signature of one or more of the commissioners. Then comes the 6 Geo. 4, c. 107, which is supposed to have repealed or put an end to that enactment. After making similar provisions as before respecting agents, it goes on to provide for the case of their clerks, and it varies it in this way—"that it shall be lawful for any such agent, or agents in partnership, to appoint any person without licence to be his or their clerk in transacting such agency; provided always, that no person shall be admitted to be such clerk to more than one agent or copartnership of agents, nor until his name and residence, and the date of his appointment, shall have been indorsed on the licence of every such agent, and signed by him, and witnessed by the signature of the collector and comptroller of the customs." This then is a different formality; in the former case it was to be signed by one or more of the commissioners; here it is to be witnessed by the signature of the collector and comptroller. And then come these words:—"unless such person shall have been appointed with consent of the commissioners of his Majesty's customs before the commencement of this act." That provision distinctly shews that he may act as clerk to the agent, if he has an appointment by the commissioners before the commencement of the act: that could refer only to licences existing under the former act, and which are supposed to have some efficacy even after the passing of this act: and if the clerk of the agent may act under such previous appointment, it proves that the licence of the principal is still in force, and would be sufficient to protect him from the penalty: and, if he is authorized to act without a fresh licence, why should not the bond continue good to enforce the obligations of the licence? Then the words of the last act, the 3 & 4 Will. 4, c. 53, being exactly the same as those of the corresponding clause of the 6 Geo. 4, as soon as you arrive at the construction of the latter, the former must be construed in

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the same manner. On that first point, therefore, Mr. *Barlow* has satisfied me that the licence and bond are still in existence; the act, although in general terms it may repeal all that it does not by necessary implication reenact, does continue and enforce the existing licences.

I come then to the other question in the case, which appears to me to arise from a confusion in the apprehension of the case of the *Attorney-General v. Key*. That was a case where the facts contradicted the description in the information: now I wish to know how the facts here contradict the description in the information? I do not see any such suggestion at all. It is agreed that the facts stated in the replication shall be taken as the facts in the case; they are considered, unless varied, as proved. Then the replication states the goods imported to be silks specifically liable to duty. There are no silks that I know of which are prohibited; they are stated as liable to duty, and that is the proper description of them. If the party could not import such goods, and warehouse them for exportation, though I do not see why he should not, that does not alter the nature of the fraud; if he has done what is illegal by importing these goods, and entering them for exportation only, and has afterwards admitted that they are liable to duty, and has endeavoured to smuggle them into the country by substituting other goods for them, that is a fraud, and a breach of his duty as an agent. I think, therefore, that judgment ought to be for the Crown.

PARKE, B.—I fully concur in the judgment of the Lord Chief Baron. With respect to the last objection, arising from the alleged variance of the facts from the record, I think there is no variance; and the only way in which the difficulty is raised, is from not sufficiently taking into consideration every thing stated in the special case. I take it that it is competent to any person to warehouse goods, either under the 3 & 4 Will. 4, c. 52, s. 60, or under c. 56,

s. 8, which goods are subject to duties the moment they are warehoused. If they are exported, the duties are not levied; if they are used for home consumption, they are levied. Now, the question upon that is, to what class of goods these belong? I think it perfectly clear that they belong to the latter class. They were silks, as is stated in the pleadings, though not found in the special case; they were goods on which the duties were ultimately paid, and I infer that they were liable to the duties on importation. They were subject to the payment of the duty under the 3 & 4 Will. 4, c. 56, s. 8, but the duty is defeasible if they are exported. If it is true that, being goods liable to duty, the defendant has entered them as goods that could not be used within this kingdom, and were admissible for exportation only, the only argument arising from that is, that he has been guilty of a double fraud. That being so, the question of fact is disposed of, and we must see whether the motion in arrest of judgment is to prevail. The bond in this case is a bond given to the commissioners of the customs: it recites that a licence had been applied for to enable the defendant to act as an agent, which had been granted, and that the bond was given for the faithful performance of his duties as such agent. The bond is supported on three grounds by Mr. *Barlow*: the first is, that it is good at common law. So it would be, if the bond had been given for the faithful execution of his duties as an agent (though the commissioners are not directed to take it in that form) for a limited time; in that case the bond could not have been avoided at common law; it is a voluntary bond, for a very good consideration; but it is to exist during the continuance of the exclusive privilege given by the licence, and if that is put an end to, the obligation of the bond is also put an end to by the provision of the 3 & 4 Will. 4, c. 52, s. 144, that no person shall act as a custom-house agent unless licensed under the act. The question is, therefore, whether the effect of the act was to put an end to the exclusive privilege the

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defendant had by his licence; the whole turns on the construction of the 144th section. If it means to continue the exclusive privilege granted to persons under the former act, the licence still continues; and the words are, "that it shall not be lawful for any person to act as an agent, &c., unless authorized so to do by licence of the commissioners of his Majesty's customs." It does not say, unless he shall be *afterwards* authorized, but unless he is authorized. The question is, what is the meaning of these terms: if they mean, "if he be authorized, or hereafter to be authorized," then the bond is in force; and it seems to me, that if the opposite construction were to prevail, the consequence would be, as was ably pointed out by Mr. *Barlow*, that no business could be transacted after the act came into operation, until the agents obtained fresh licences, and business would be suspended until the whole class should have taken out their licences. The argument arising out of the appointment of the clerks is also a very strong one; the clerk continues, and how absurd it would be if we were not to hold that the principal continues also. A doubt was raised by Mr. *Jervis*, when he moved this rule, whether it was the intention of the legislature to keep alive the bond and licence; and we have had quoted five cases to shew that it was done by express words in those instances. These have been gone through by Mr. *Barlow*, and he has shewn very good reasons for the introduction of those clauses; because, in every one of those cases, except that referred to in the Registry Act, it is clear that the words are prospective; and if they are to give operation to existing bonds or licences, there must be a clause to that effect; he has explained all, except the provision as to the ship's register, and has given a plausible reason for that. And after all, if the legislature has been more scrupulous in those cases than in this, it does not follow that they did not mean the same thing here. It seems to me, that the act continues the privilege of acting as licensed agent, and that

s. 144 is to be read, "unless already authorized, or hereafter to be authorized;" and if so, the licence continues, and the bond continues also.

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BOLLAND, B.—I am of the same opinion. After what has been stated so fully by the Lord Chief Baron and my Brother *Parke*, I think it unnecessary to assign any reasons for coming to that conclusion, except as to the continuation of the licence. I think it is quite clear, that, by the 3 & 4 Will. c. 52, ss. 144 to 147, it was intended that these should be continuing licences; because the provisions in those clauses are such as would not be consistent with the annihilation of the licences existing at the passing of the act. The first clause, the 144th, my Brother *Parke* has alluded to, and I will not go again over the ground he has so clearly pointed out. But in the 147th section there is a provision, that no person shall be admitted to be clerk to more than one agent, nor until his name and residence, and the date of his appointment, shall have been endorsed on the licence, &c., "unless such person shall have been appointed with the consent of the commissioners before the commencement of this act." Does not that mean clerks appointed before the passing of the act? Let us look at the consequences of the opposite conclusion. There would be a perfect hiatus, during which they must suspend all operations. Nor is there anything in the last acts which at all makes it necessary to alter the nature of these bonds. On these grounds, I think there is no foundation for the defendant's argument upon the first point; and upon the second point, which has been so fully commented on that I need not add anything more, I think the Crown is equally entitled to judgment.

GURNEY, B., concurred.

Judgment for the Crown.

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BASS v. COOPER and Three Others.

The defendants, after obtaining a week's time to plead, took out several summonses, on successive days, for further time, the last being returnable on the day after the week's time expired; but took no order on either of them. On that same day the plaintiff signed judgment:—
Held regular.

IN this case *Jervis* had obtained a rule for setting aside a judgment signed against three of the four defendants, for irregularity. The declaration was delivered, with a demand of plea, on the 13th December; on the 4th January an order was obtained for a week's time to plead, on the application of two of the defendants,—which therefore expired on the 11th; on the 9th a summons was taken out before a Judge of the King's Bench, on behalf of all the defendants, for further time to plead, returnable on the 10th; on the 10th they took out a second similar summons, returnable on the 11th, but not peremptory; and on the 11th another peremptory summons for the same purpose was taken out before a Baron, returnable on the 12th. On the latter day, at eleven o'clock, the plaintiff signed judgment. The alleged irregularity was, that the summons of the 10th being returnable and returned before the expiration of the time for pleading, operated as a stay of proceedings, and precluded the plaintiff from signing judgment till it was disposed of.—It was also contended, on the authority of *Kemp v. Fyson* (a), that the judgment could not be signed until the evening of the 12th; but now, after the decision in *Blundell v. Hanson* (b) overruling that case, this ground of objection was given up.

Platt shewed cause, and objected, in the first place, that the summons of the 10th was improperly taken out before a Judge of the King's Bench. [*Parke, B.*—There is no doubt that the Judges of all the Courts have the same jurisdiction in such matters.] Then the summons of the 11th was an abandonment of the two former.

(a) 3 Dowl. P. C. 265.

(b) Ante, p. 243.

PARKE, B., (to *Jervis*).—Why did not you take out an order on the second summons, on the 11th? You are not at liberty to go on ad infinitum with successive summonses. The rule must be discharged, but without costs, as it was obtained on the supposed authority of *Kemp v. Fyson*.

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Rule discharged.

GILBERT and Another v. PAPE.

MANSEL moved for the defendant's discharge under the 48 Geo. 3, c. 123, as having lain in prison twelve months for a debt under 20*l*. It appeared, however, that the defendant had not been a prisoner within the walls, but had resided in the rules of the prison.

A defendant is not entitled to his discharge under the 48 Geo. 3, c. 123, unless he has been confined for the twelve months *within the walls of the prison*.

Barstow shewed cause, and relied on a case of *Sumption v. Monzani* (a), in the King's Bench, as shewing that a residence within the rules was not the custody contemplated by the act of parliament; and on the authority of that case, the rule was

Discharged.

(a) Certified by the Master of the King's Bench:—

SUMPTION v. MONZANI, K. B., Easter Term, 1836.

This was an application for the defendant's discharge out of custody, under the 48 Geo. 3, c. 123. In full Court:—Held not entitled to his discharge, not being in actual custody *within the walls*, but living within the rules.

Archbold, for the plaintiff; *Petersdorff*, for the defendant.

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POOLE'S Bail.

Where the defendant is a prisoner, and two days' notice of bail is given, the notice must state that the defendant is a prisoner.

CLARKSON moved to justify bail in this cause; but the notice being only a two days' notice, and not stating, as the case really was, that the defendant was a prisoner, **Gurney, B.**, (sitting alone), was of opinion that the bail ought to be rejected; but **Clarkson** stated, that in a case before **Littledale, J.**, in the Bail Court (a), the same objection had been overruled, on the ground that the plaintiff must be fully aware of the fact of the defendant's being a prisoner.

GURNEY, B., referred to the cases of *Creighton's Bail* (b), and *Frith's Bail* (c), and desired this motion to be made to the full Court.

Clarkson now moved accordingly.

PARKE, B.—The notice ought to state the fact that the defendant is a prisoner. We have made some inquiry about the case referred to, but are not satisfied as to its circumstances. The plaintiff does not necessarily know that the defendant is in custody, since he may render without any information being given to the plaintiff; this notice is therefore irregular.

GURNEY, B.—There is also this difference, that in this Court the rule of allowance operates as a supersedeas, and discharges the prisoner out of custody: which is not so in the King's Bench.

Bail rejected.

(a) *Pierce's Bail*, 5 Dowl. P. C. 252. (b) 1 Cr. & M. 335.
(c) 2 Dowl. P. C. 229.

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JONES v. BARNES.

THIS was an action of assumpsit for goods sold and delivered, and on the trial before the under-sheriff of Gloucestershire, the plaintiff recovered a verdict for an amount under 40s.

Where the verdict, in a cause tried before a sheriff or judge of an inferior court, by writ of trial, under 3 & 4 Will. 4, c. 42, s. 17, is for less than 40s., he has no power to certify, under the 43 Eliz., c. 6, s. 2, to deprive the plaintiff of costs; and the Court will not interfere to stay the proceedings on payment of the debt without costs; but *semble*, it would be a sufficient answer to an application for a writ of trial, that the sum in dispute is less than 40s.

Francillon now moved for a rule to shew cause why the plaintiff should not produce the writ of trial to the under-sheriff, for him to certify thereon, under the 43 Eliz. c. 6, s. 2, that the damages recovered were under 40s., in order to deprive the plaintiff of costs; or why, upon payment of the debt without costs, all proceedings should not be stayed. [*Parke*, B.—Has the sheriff any power to certify under that statute?] The statute authorizes “the Judges of the Court, and the justices before whom the cause is tried,” to certify. The sheriff, though not a *justice*, is a *judge*, before whom the cause is tried. He has the same powers as a judge to nonsuit, and direct the jury, and reserve points for the consideration of the Court. If he has not a power to certify, the Writ of Trial Act has to this extent repealed the 43 Eliz. In *Wardroper v. Richardson* (a), the Court certainly decided against a similar application; and *Parke*, B., there said, it was not intended by the 3 & 4 Will. 4, c. 42, s. 17, to give the power of certifying to sheriffs and other judges to whom causes were sent by writ of trial; that there was once a clause to this effect in the bill, but it was struck out. [*Parke*, B.—I only spoke of that historically. Lord *Abinger*, C.B.—The sheriff is made, in effect, not a judge or a justice, but an officer or commissioner of the Court only, for the purpose of trying the cause.] Then the Court will grant the other part of the application, that

(a) 1 Ad. & Ellis, 76.

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upon payment of the debt without costs, all further proceedings may be stayed. [*Parke, B.*—It must appear that the debt really due was under 40*s.*, and that it was one which could be sued for in the County Court.] It appears from the verdict that the debt was under 40*s.*, and the venue being laid in the county of Gloucester, it must be taken that the debt was incurred for goods sold and delivered in that county. [*Parke, B.*—The goods may have been sold in one county and delivered in another. Have you any case in which the Court has interfered, except at an earlier stage of the proceedings, and unless it appeared from the pleadings, or from the plaintiff's own admission, that the cause of action was less than 40*s.*, or that the plaintiff was not *bonâ fide* suing for more?] Certainly not; but before the recent act, the Courts were not called upon to interfere after verdict, because the Judge at the trial had power to certify. Perhaps the Court may think, that as the sheriff was only their officer, and they were trying the cause by him, they can now grant the certificate.

LORD ABINGER, C. B.—No; the Court has no such power. On the application to have the cause tried before the sheriff, the defendant had the means of suggesting that the action was brought for less than 40*s.*, as a reason for not trying it before the sheriff.

PARKE, B.—If the action is brought for less than 40*s.*, that should be shewn for cause before the Judge, on the application to have the cause tried before the sheriff.

The other Barons concurred.

Rule refused

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TAYLOR v. MONTAGUE.

GODSON had obtained a rule for judgment as in case of a nonsuit; against which *Knowles* now shewed cause, on an affidavit stating that since issue was joined, the plaintiff had become bankrupt, and his assignees had refused to proceed with the action. He offered to give a peremptory undertaking.

A plaintiff, after issue joined, became bankrupt, and made default, and his assignees refused to proceed with the suit: the Court refused to discharge a rule for judgment as in case of a nonsuit on a peremptory undertaking, unless security for costs were also given.

Godson having been heard in support of the rule,

PER CURIAM.—The bankruptcy has put an end to the plaintiff's right of action, and vested it in the assignees, who refuse to proceed with the suit. The rule can be discharged only on a peremptory undertaking, and on the plaintiff's giving security for the costs of the cause within a month from this time; otherwise the rule must be absolute.

Rule accordingly.

WILKINS v. PERKINS.

MARTIN had obtained a rule to shew cause why the taxation of costs should not be set aside for irregularity, on the ground that no copy of the bill of costs and affidavit of increase had been delivered with the notice of taxation, pursuant to rule 10, M. T. 1 Will. 4. It appeared that the plaintiff's attorney having obtained an appointment to tax, and served it on the defendant's attorney, attended at the time appointed before the Master, but the defendant's attorney did not attend, and the bill was taxed ex parte.

When a copy of the bill of costs and affidavit of increase has not been delivered with the notice of taxation, as required by rule 10 of M. T. 1 Will. 4, the taxation is irregular, unless the other party waives the objection by attendance or otherwise; and the Court will set it aside.

Humfrey shewed cause, and contended that the practice was to deliver a copy of the bill of costs with the

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notice of taxation, only in case the other party required it; but if it was not required, it was sufficient if it were given to the party on going before the Master.

PARKE, B.—The rule requires that a copy of the bill shall be delivered with the notice of taxation, and the practice is that the party shall do so, unless the rule is waived. Here the party did not attend the taxation, and there was nothing which amounted to a waiver. The terms of the rule are express.

The other Barons concurred.

Rule absolute.

—◆—
REX v. The Sheriff of KENT, in a Cause of POTTER v. SIMPSON.

"The defendant is not to be found in my bailiwick" is a bad return to a writ of capias.

Negligence in the execution of mesne process is no ground for an attachment against a sheriff.

AN attachment having issued against the Sheriff of Kent for not making a return to a writ of capias:

Clarkson moved to set aside the attachment, on the ground that the sheriff had made a return, which the affidavit on which he moved stated to be as follows:—"The within-named defendant is *not to be found* in my bailiwick." He argued that this was a sufficient return, and could not have misled the plaintiff. [Parke, B.—The return is irregular. Non est inventus is the proper return; that is, "He is *not found* in my bailiwick."] The affidavit states that in practice returns have been made in this form, and in the appendix to *Watson on Sheriffs* (a), the form is so given.

PARKE, B.—The usual return is, "He is not found in my bailiwick," which means, that he could not be found

(a) Appendix, c. 6, s. 3, p. 370.

at any time while the sheriff had the writ. The officer informs us that that is the uniform mode of making the return.

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ALDERSON, B.—The common return of non est inventus has a specific technical meaning, and it had better not be departed from. This return, not being in the usual form, was irregular. The argument now raised shews the importance of adhering to the strict form.

Clarkson then obtained a rule to shew cause why the return should not be amended, and why the attachment should not be set aside, on payment of costs. Against which,

Chandless subsequently shewed cause, and urged that the sheriff had not used due diligence in endeavouring to make the arrest.

PARKE, B.—Assuming that to have been the case, what means have we now of ascertaining what amount of damage the plaintiff may have sustained by the sheriff's default in the execution of mesne process?—How, then, can the attachment be allowed to stand, which fixes him for the amount of the whole debt? The attachment must be set aside on payment of costs.

Rule absolute.

ALLEN *v.* WALKER.

ASSUMPSIT against the defendant as the indorser of a bill of exchange for 22*l.* 5*s.*, drawn by one Susanna Morley
 To an action against the defendant as indorser of a bill of exchange,
 he pleaded that "he did not make or draw the bill of exchange as in the declaration alleged:"—
 Held, that the plaintiff was not entitled to treat this plea as a nullity, and sign judgment as for want of a plea.

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on and accepted by Rebecca Saunders, and by the said S. Morley indorsed to the defendant, who indorsed it to the plaintiff: with a count upon an account stated. The time for pleading being out, an application was made to *Bolland, B.*, at chambers, for further time to plead, but on hearing the attorneys on both sides, that application was refused; whereupon the defendant's attorney delivered to the plaintiff's attorney at the judge's chambers a plea of the general issue. On the same day another plea was delivered at the office of the plaintiff's attorney in the city, and notice was served that the plea first delivered was abandoned. The plea so left at the office was, as to the first count, that "the defendant did not make or draw the said supposed bill of exchange in the first count mentioned, as in that count alleged;" to the last count, non assumpsit. The plaintiff's attorney, not knowing to which of the pleas the notice referred, signed judgment.

R. V. Richards having, on a former day, obtained a rule to shew cause why this judgment should not be set aside,

Evans now shewed cause.—The judgment was properly signed; because, if the defendant's attorney intended that the plea of non assumpsit to the whole declaration should remain, that is no plea to the first count. But the other plea to the first count, that the defendant did not make or draw the bill of exchange, is a nullity. The plea ought to traverse or deny some allegation in the declaration; but this plea does not, as it is not alleged in the declaration that the defendant drew the bill, but only that he indorsed it. The judgment is therefore regular.

PARKE, B.—The plea is bad in point of form, but as every indorser is in law a new drawer, it is good in substance. If the declaration be considered with that view, you cannot treat such a plea as a nullity. You should have demurred to the plea instead of signing judgment.

ALDERSON, B.—The plea is, that the defendant did not make or draw the bill of exchange as in the first count alleged. Now the manner in that count alleged is by indorsement. That is a traverse, and the plea cannot be treated as a nullity.

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The rest of the Court concurred.

Rule absolute.

GARDEN v. CRESWELL.

ERLE, on a former day, had obtained a rule for an attachment against a witness, for not obeying a subpœna, by which the plaintiff sustained a loss upon the trial.

An affidavit to ground a rule nisi for an attachment for not obeying a subpœna, must state that at the time of the service the original subpœna was shewn; and it is a sufficient answer to such a rule that the affidavit does not so allege.

Barstow shewed cause.—There is a preliminary objection here, inasmuch as the affidavit on which the rule was obtained does not state that at the time of the service of the subpœna the original subpœna was shewn, which is essential; *Wadsworth v. Marshall* (a). There *Bayley*, B., says, “The Master reports to us that the ordinary course is to shew the original process at the time of service, and that unless that be done an attachment cannot be moved for.” It may be said that in that case it was stated in the affidavit of the party against whom the application was made, negatively, that the original subpœna was not shewn; but in *Rex v. Wood* (b), it was held by *Littledale, J.*, that it must be shewn by the party applying for the attachment that the original was shewn. So, in *Wilton v. Chambers* (c), on a motion for an attachment against a sheriff for an insufficient return, the Court refused to take cognizance of the return unless an

(a) 1 Cr. & Meeson, 87.

(c) 5 Nev. & Man. 431.

(b) 1 Dowl. P. C. 509.

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office copy were produced, verified by affidavit, although there was an affidavit by a party as to his belief that no sufficient return had been made. That was on the principle that when seeking to bring a party into contempt you must come with proper materials, and that it must be shewn clearly that the contempt has been committed.

Erle, contra.—In the case of *Wadsworth v. Marshall*, the affidavit in answer to the rule stated expressly that at the time of the service the original was not shewn; and it is submitted that it is incumbent on the party to do so.

Lord ABINGER, C. B.—No, that is not necessary. The party against whom the application is made may shew cause on the affidavits used against him; and whenever a party is sought to be brought into contempt, it must be clearly made out that he has been guilty of it.

The rest of the Court concurred.

Rule discharged, with costs.

DOE *d.* NANNEY *v.* GORE.

A local inclosure act empowered the commissioner, by deeds executed in the presence of and attested by two witnesses, to

sell such portions of the waste lands as should be necessary to defray the expenses of carrying the act into execution, before award made. In ejectment by a party claiming under a conveyance from the commissioner in pursuance of such power, it appeared that the lessor of the plaintiff purchased the land with the view of exchanging it with the defendant; that he never took possession of it, and that the defendant, some years after the conveyance, fenced it in, and had occupied it by his tenants ever since, a period of less than 20 years. It did not appear that any award had been made under the Inclosure Act:—*Held*, that the plaintiff was not bound, in order to recover in the ejectment, to prove that the commissioner had duly qualified, and given the notices, &c. required by the General Inclosure Act, before the execution of the conveyance.

by a conveyance from Walter Jones, the commissioner appointed by a local act of parliament, passed in the year 1812, for the inclosure of the commons and waste lands within the parish of Llanfihangel-y-Pennant, and which contained a clause empowering the commissioner, before making any award, to sell such portions of the waste lands as should be necessary for the purpose of carrying the act into execution, and to convey the same by indenture, to be executed by him in the presence of, and attested by, two credible witnesses. The commissioner, in pursuance of such power, put up to auction, in January 1816, the land in dispute in this action, together with other portions of the wastes, and it was purchased by a Mr. Williams, who was at that time the land-agent of Mr. Gore, the defendant, for Mr. David Nanney, the uncle of the lessor of the plaintiff: but on the conveyance being produced, the execution by the commissioner appeared to be attested by one witness only. It was thereupon objected for the defendant, that the conveyance by the commissioner being in execution of a power, all the requisites of the power must be strictly pursued, and therefore the conveyance was invalid for want of the attestation of a second witness. The learned judge reserved the point, and allowed the case to proceed. It appeared that the land was purchased by Mr. Nanney with the view of exchanging it and other land of his in the neighbourhood, for some fields of the defendant's lying nearer to his residence. A valuation was accordingly made, by two surveyors respectively appointed by Mr. Nanney and the defendant, of the property proposed to be exchanged, including Moelhebog. Mr. Nanney, in consequence, never took actual possession of that piece, and the defendant, about three years after the date of the conveyance, inclosed with a stone wall three sides of it which were before open to the common, and his tenants had ever since occupied it. The negotiation for the exchange ultimately went off; but letters of the de-

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defendant were put in, in which he recognized the title of the plaintiff under the conveyance, and admitted the receipt of the valuation. Mr. David Nanney died in 1825, having devised his real estate to the lessor of the plaintiff. It did not appear that the commissioner had made any award under the inclosure act.

On this evidence, it was objected for the defendant, that inasmuch as no possession had been taken in pursuance of the conveyance from the commissioner under the inclosure act, the plaintiff could not recover on the mere title conferred by the conveyance, but was bound to have proved the qualification of the commissioner, and that the notices, &c., required by the General Inclosure Act, 41 Geo. 3, c. 109, in order to give him authority, had been given; and *Rex v. Haslingfield* (a) was referred to as an authority to that effect. The learned judge reserved this point also; and a verdict having been found for the plaintiff,

Jervis, in Michaelmas term, moved for a rule nisi to enter a nonsuit, pursuant to the leave reserved. No possession having been taken under the conveyance from the commissioner, it was incumbent on the plaintiff to shew his qualification, and the regularity of his proceedings. The non-execution of any award raised an inference that there was some defect in the proceedings. *Rex v. Haslingfield* is strongly in point. There was here the same negative evidence as in that case to impeach the title derived from the commissioner, the defendant having retained possession of the land. [*Alderson*, B.—The defendant shews no title at all.] The question is, whether the plaintiff has shewn title. [*Parke*, B.—How does the evidence raise any presumption that the commissioner had not duly qualified?]

(a) 2 M. & Sel. 558.

The rule was refused on this point, but on the objection taken to the validity of the conveyance a rule nisi was granted, which in Hilary Term was made absolute,—*Welsby*, who appeared to shew cause, admitting that that objection must prevail.

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Rule absolute.

JONES v. JONES.

JERVIS had obtained a rule to shew cause why the taxation of costs in this case should not be set aside, on the ground that the plaintiff's attorney was not an attorney of this Court during the time that the business was done, and had not the consent in writing of any attorney of this Court authorizing him to practise in his name, pursuant to 2 Geo. 2, c. 23, s. 10. The affidavit on which the rule was obtained stated that the action was commenced in the month of February 1836, by Messrs. Weeks and Gilbertson, as the agents of Mr. H. R. Williams, who was and acted as attorney for the plaintiff in this cause from the time of the commencement thereof: that the said H. R. W. was admitted an attorney of this Court on the 23rd of May last, and not before: that the defendant's agent attended the taxation of costs, and objected to all costs incurred before the 23d of May being allowed, on the ground that the said H. R. W. was not admitted an attorney of this Court before, and that he the said H. R. W. was the plaintiff's attorney in the cause, and had practised therein in his own name as such attorney, and not in the name of any other attorney of this Court, with the consent in writing of such attorney, signed by such attorney; but that, notwithstanding such objection, the Master allowed the plaintiff costs from the commencement of the cause.—Another affidavit also stated that the name of H. R. W. was indorsed on the copy of the writ of summons: that

It is no ground for disallowing the plaintiff's attorney the costs of a cause, in which the plaintiff has recovered a verdict, that he is not on the roll of attorneys of this court, if it appears that the London agent's name is indorsed on the record and proceedings, and he has conducted all the business in court, and corresponded with the country attorney on the subject of the suit.

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R. V. Richards shewed cause on the affidavit of Mr. Gilbertson, an attorney of this Court and Mr. Williams's London agent, which stated that his name was inserted in the declaration with his consent and permission, and that his name was indorsed on the back of the declaration and other proceedings; that the said H. R. W. had been many years an attorney of the King's Bench; that he the deponent had sent the said H. R. W. a copy of the declaration filed in the cause, and had, from the beginning of the proceedings in the action, conducted so much thereof as is usually conducted by London agents. *Richards* contended that from these facts the consent of the London attorney must be inferred, and that there was nothing contrary to the 2 Geo. 2, c. 23. [*Parke, B.*—This is similar to the case of *Goodner v. Cover (a)*, where it was held to be no ground for disallowing the plaintiff's attorney's costs, if it appeared that he conducted the proceedings in the name of a London attorney, who was an attorney of this Court.]

Jervis, contra.—There the proceedings must have been in the name of the London attorney, but here the name of the country attorney was indorsed on the writ, and in the affidavit of increase he describes himself as the plaintiff's attorney. The case of *Latham v. Hyde (b)* shews that an attorney of another court, who conducts an action in this Court in his own name, can bring no action for his fees. The consent is by the statute a condition precedent, and the want of it cannot be cured by any subsequent adoption by the London agent. *Meekin v. Whalley (c)*,

(a) 3 Dowl. Pr. C. 424.

(b) 1 C. & M. 128.

(c) 1 Bing. N. C. 59; 4 Moo. & Sc. 494; 2 Dowl. P. C. 823.

which was a case on the Certificate Act, and *Humphreys v. Harvey* (a), which was a question as to the enrolment, shew how strict the rules are which apply to attornies. The proviso in the statute is applicable to *all* attornies, and makes no exception for country attornies practising in the names of their London agents.

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LORD ABINGER, C. B.—This case is distinguishable from *Latham v. Hyde*. The particulars of that case are not fully stated in the report: but there is enough to shew that it was not like the present case. The statute does not require any formal licence, and there is evidence of the country attorney's having acted with the consent of his agent. In truth, Mr. Gilbertson himself is acting as the attorney in Court, and in all that is done in town. I do not think that the principle on which the statute is framed applies to such a case as the present. *Latham v. Hyde* only decides, that where an attorney presumes to practise in the name of another attorney, without his consent, he shall not recover his costs.

PARKE, B.—It certainly appears to me that Gilbertson is the real attorney in the suit as far as relates to this matter. I apprehend the statute does not apply to a country attorney, who employs an agent in London to conduct the business of the suit in Court. But even if it does, there is evidence here of the consent to be collected from the correspondence.

BOLLAND, B., and GURNEY, B., concurred.

Rule discharged.

(a) 1 Bing. N. C. 62; 4 Moo. & Sc. 500; 2 Dowl. P. C. 827.

the defendant had a verdict, the jury finding that the river was common to both parties. *Exch. of Pleas,*
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In Michaelmas term, *Chillon* obtained a rule nisi for a new trial, on the ground that the evidence was improperly rejected: citing *Doe d. Barrett v. Kemp* (a).

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John Evans and *W. M. James* now shewed cause.—The evidence was rightly rejected. It was an attempt to give in evidence acts which were altogether *res inter alios actæ*, in order to decide the question of ownership between these parties. The acts done or permitted between the plaintiff and third parties, above or below the land of the defendant, could not possibly afford any criterion for determining the plaintiff's rights as to that portion of the stream which adjoined the defendant's land. The exercise of the right as against the owner of *Cefn Cerrig* may have arisen out of some arrangement with or grant from the proprietor or occupier of that farm: or if not, how can his acquiescence or laches bind the defendant? Can it be said that a grant from the owner of *Cefn Cerrig*, to the plaintiff or his predecessors, of the bed of the stream opposite that farm, could have been used in evidence against the defendant? [*Parke, B.*—Acts of ownership are not admitted in evidence on the ground of *acquiescence*—that goes only to the *value* of the evidence—but as shewing possession, and so proving title.] If there had been any evidence that both the farms, *Dol-y-Gwynen* and *Cefn Cerrig*, had formerly been the property of the same person, and that these acts of ownership had then been exercised, there would be some ground for saying that the evidence was applicable to the question at issue. [*Parke, B.*—How do you distinguish this case from *Doe v. Kemp*? There it was held, that upon a question whether a slip of waste land between a highway and the enclosed lands of the plaintiff

(a) 2 Bing. N. C. 102; 2 Scott, 9.

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belonged to him or to the lord of the manor, the lord might give evidence of acts of ownership on other portions of the waste land between the same road and the inclosures of other persons, although at a distance from the piece in dispute. Is not the same principle applicable to the case of a river?] The decision there proceeded on the ground that the successive slips of land were portions of *one continuous waste*: but it was also held that acts of ownership exercised over other parts of the waste within the same manor, but not adjoining the same road, were *not* evidence. Lord Denman, C. J., in delivering the judgment of the Court, says:—"If the lord has a right to one piece of waste land, it affords no inference, even the most remote, that he has a right to another in the same manor, *although both may be similarly situated with respect to the highway*: assuming that all were originally the property of the same person, as lord of the manor, which is all that the fact of their being in the same manor proves, no presumption arises from his retaining one part in his hands, that he retained another; nor if in one part of the manor the lord has dedicated a portion of the waste to the use of the public, and granted out the adjoining land to private individuals, does it by any means follow, nor does it raise any probability, that in another part he may not have granted the whole out to private individuals, and they afterwards have dedicated part as a public road. But the case is very different with respect to these parcels, which from their local situation may be deemed parts of one waste or common; as acts of ownership in one part of the same field are evidence of title to the whole." Those observations apply strongly to the present case. The ground on which that, and the other cases on the subject, proceed, is the existence of a unity of title extending over some general district, *capable of being recognized as a whole*. Thus, in *Stanley v. White* (a), this recogniz-

(a) 14 East, 352.

able whole consisted of the woody belt surrounding the whole of the plaintiff's land; in *Tyrwhitt v. Wynne* (a), the fact required by the Court to make the leases tendered in evidence admissible, was, that the locus in quo should be proved to constitute part of *one entire waste*, to which the leases were applicable; and the same with respect to the grants in *Doe v. Kemp*. Here no continuity of title whatever is shewn; all that appears is, that different rights have been exercised in different parts of the same river. If the plaintiff claimed the whole river or the whole fence, the case would be different; but he only claims fifty yards of it, and says he is entitled to them because he has exercised acts of ownership on the next fifty yards. In the same manner he may assert a title to another successive portion of fifty yards, and so on, till he entitles himself to the whole river. Would it have been any proof of title in *Doe v. Kemp*, if the defendant, not being the lord of the manor, had proved acts of ownership on a slip of the waste land between that road and the lands of the proprietor next to the plaintiff? It may be said, that the continuous fence *does* constitute one assignable whole, in the sense which has been contended for; but the distinction is, that here the plaintiff does not claim the whole fence, but only a given length of it: and its continuity is broken by the cross fence between the defendant's farm and that of Cefn Cerrig. The plaintiff is bound to make out that this evidence alone, if he had given no other, would have afforded grounds on which the jury might have drawn a reasonable presumption in favour of his right: whereas, at most, it can bear upon it only by such a chain of remote possibilities as no reasonable man would act upon: viz. on the assumption that both the adjoining farms were once in the hands of the same proprietor, and were parted with at the same time, on the same principle of entire exclusion from the river. On the other

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(a) 2 B. & Ald. 554.

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hand, the mere change of current, so frequent in mountain streams, may have transferred the plaintiff's boundary from the middle to the bank of the river as against Cefn Cerrig, while it remained unaltered as against Dol-y-Gwynen.

Chilton, contra, (having referred to *Evans v. Butt*, tried before Lord Denman, C. J., at Gloucester, and decided this term in the Court of King's Bench), was stopped by the Court.

LORD ABINGER, C. B.—Taking the whole of the circumstances in this case together, as explained by the map, it appears to me that the evidence was admissible, though I by no means wish to be understood as saying that it would be entitled to any great weight, unless accompanied with other circumstances to give effect to it. Now the question is this:—The object of the plaintiff was to prove that he was the owner of the whole stream, and for that purpose it was important to shew that the usual proposition of law, that each party was entitled *ad medium flum aquæ*, was not applicable in the present case; and in order to shew that, he was endeavouring to prove that upon both sides of the river—on the same side with the land of the defendant—he had exercised acts of ownership, such as repairing the hedge; and therefore he claimed a right up to the hedge; and then going further, he shews that the hedge continued a visible line of demarcation without any thing occurring to break its continuity,—except that a cross hedge ran down to it, dividing the defendant's farm from his neighbour's land on the same side of the river,—down to a considerable distance, till it came opposite to the extremity of the plaintiff's land on the other side. From these facts the plaintiff purposes to shew that it is all his; and it appears to me that the evidence ought to have been received, in order to rebut the

proposition that the middle of the river was to be considered as the boundary between two distinct closes. I should have thought the evidence admissible—it might not appear very strong, unless coupled with other evidence of some sort; it appears to me, however, that it was evidence on behalf of the plaintiff; and, inasmuch as that evidence was rejected, that the case ought to go down again to a new trial.

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PARKE, B.—I am also of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, were admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shewn only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed: evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person: though it by no means follows as a necessary consequence, for different persons may have balks of land in the same inclosure; but this is a fact to be submitted to the jury. So I apprehend the same rule is applicable to a wood which is not inclosed by any fence: if you prove the cut-

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ting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole ; and the case of *Stanley v. White*, I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So I should apply the same reasoning to a continuous hedge; though no doubt the defendant might rebut the inference that the whole belonged to the same person by shewing acts of ownership on his part along the same fence. It has been said, in the course of the argument, that the defendant had no interest to dispute acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party: they are admissible of themselves, *proprio vigore*, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight. That observation applies only to the effect of the evidence. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, is entitled to shew the taking of stones, not only on the spot in question, but all along the bed of the river, which he claims as being his property; and he has a right to have that submitted to the jury. The same observation applies to the fence and the banks of the river. What weight the jury might attach to it, is another question. The principle is the same as that which is laid down in *Doe v. Kemp*.

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

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LAMBERT and Others *v.* NORRIS and Others, Assignees of the Estate and Effects of TURNER & DAVEY, Bankrupts.

ASSUMPSIT for the use and occupation of certain cottages, warehouses, workshops, &c. Plea—payment into Court of a sum of 57*l.* Replication—damages ultra. At the trial before *Gurney, B.*, at the London Sittings after last Michaelmas Term, it appeared that the plaintiffs were the devisees of one M. Boyd, and the defendants were the assignees of Messrs. Turner & Davey, paper manufacturers. In the year 1828, Mr. Boyd granted a lease of certain premises to Messrs. G. W. & R. Turner for twenty-one years, at the rent of 230*l.* per annum. These premises consisted in part of a manufactory which Mr. Boyd had erected for the lessees; and after the lease had been executed, Mr. G. W. Turner applied to him to enlarge the building, which he consented to do on an agreement by Mr. G. W. Turner to pay a rent of 10 per cent. upon the additional outlay. This amounted to 215*l.*, and a rent of 20*l.* a-year was consequently claimed by Mr. Boyd. At the same time Mr. G. W. Turner agreed to pay for a shed which he took into his occupation. On the 30th of December, 1830, G. W. & R. Turner dissolved partnership. G. W. Turner continued in the business, taking in Davey as a partner. Turner & Davey made another application to Mr. Boyd to enlarge the buildings, to which he assented on the same terms, namely, on the receipt of a per-centage on the additional outlay. This amounted to 250*l.*, and the rent claimed was 25*l.* Some other premises were taken by Messrs. Turner & Davey, at a specific rent, under a written agreement. On the 3rd of May, 1835, a fiat issued against Messrs. Turner & Davey, under which they were declared bankrupts; and in the course of the same year Mr. Boyd died. The as-

A landlord who had demised certain premises for 21 years by deed, at the rent of 230*l.*, agreed to enlarge the buildings, the lessees agreeing to pay 10 per cent. additional on the outlay. The buildings were accordingly made, and the lessees subsequently became bankrupt, and their assignees took possession of the premises:—*Held*, in an action for use and occupation brought against the assignees, that this was a collateral agreement, and not a contract running with the land, upon which the assignees were liable.

In that case, *Littledale, J.*, in delivering the judgment of the Court, says, "The only way in which it could be taken to be rent is, that this contract creates a new demise at an increased rent, and that, therefore, by operation of law, the old lease is surrendered by such new demise;" though he certainly adds—"but it could never be in the contemplation either of the landlord or the tenant, that the old lease should be at an end, and that instead of it a new lease should be created, which, being only by parol, could only have the effect of a lease at will."

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LORD ABINGER, C. B.—It cannot be supposed that the parties intended that there should be a surrender of the lease. If the landlord had afterwards given a notice to quit, and had brought an action of ejectment upon it, the lease would have been a good answer to the action. The action ought to be brought upon the contract, against the original party to the contract.

PARKE, B.—*Donellan v. Read* is decisive against the plaintiffs. *Littledale, J.*, there says—"The assignee of the term could not be charged with the increased rent."

Rule refused.

GRIFFITH v. HARRIES and Another.

TRESPASS for assault and false imprisonment. Pleas By the provisions of the Game Act, 1 & 2 Will. 4, c. 32, s. 37, every penalty
—1st, not guilty; 2ndly, a tender of 10*l.* in full of amends; on which the plaintiff took issue.

for any offence against that act is to be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, &c. in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general county rate; but by the 5 & 6 Will. 4, c. 20, s. 21, reciting the former act, it is enacted, that one moiety of all such penalties shall go and be paid to the person who shall inform and prosecute for the same, and the other moiety thereof only shall go and be paid to such overseer or officer, and be by him applied in the manner before directed:—*Held*, that a conviction for an offence against the former act, which directed the whole penalty "to be paid to W. J., one of the overseers of the poor of the parish &c., to be by him applied according to the direction of the statute in such case made and provided," was bad, and that the justices who signed it were liable to an action for false imprisonment at the suit of the party convicted, and committed to gaol for non-payment of the penalty.

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At the trial before Lord *Denman*, C. J., at the last Pembrokeshire Assizes, it appeared that the action was brought against the defendants, who were two magistrates of the county of Pembroke, for imprisoning the plaintiff under a warrant of commitment, on a charge of having used a dog and gun for destroying game, without having a game certificate; on which charge he was detained in prison a month. In answer to this case, the defendants put in the following conviction:—"Pembrokeshire (to wit). Be it remembered that, on the 29th day of December, in the year of our Lord 1835, at &c., Daniel Griffith, of &c., is convicted before us, J. H. Harries and W. Jones, Esquires, two of his Majesty's justices of the peace acting in and for the county of Pembroke aforesaid, for that he the said D. Griffith did, on the 25th day of December instant, at the parish of Mathry, in the said county of Pembroke, use a gun and dogs for the taking of game, he the said D. Griffith not being authorized so to do, for want of a game certificate; contrary to the statute in that case made and provided. And we the said justices *adjudged* the said D. Griffith for his said offence to forfeit and pay the sum of 3*l.*, and also the sum of 10*s.* 6*d.* for costs; and in default of immediate payment of the said several sums, he the said D. Griffith shall be imprisoned in the house of correction, and kept to hard labour, at Haverfordwest, for the space of one month, unless the said several sums shall be sooner paid: and we direct that the said sum of 3*l.* shall be paid to W. J., one of the overseers of the poor of the parish of Mathry aforesaid, in which parish the said offence was committed, to be by him applied according to the direction of the statute in such case made and provided. And we order that the said sum of 10*s.* 6*d.* for costs shall be paid to George Jordan Harries, the complainant. Given under our hands and seals, &c.

"J. H. Harries,
"Wm. Jones."

At the trial, it was objected that the conviction was bad, inasmuch as by the adjudication the penalty was directed to be paid to the overseer of the parish, according to the Game Act, 1 & 2 Will. 4, c. 32, s. 37, instead of one moiety to the informer, and the other moiety only to the overseer, as required by the 5 & 6 Will. 4, c. 20, s. 21. The Lord Chief Justice being of this opinion, directed the jury to find a verdict for the plaintiff, unless they were satisfied that a sufficient sum had been tendered for amends. The jury found a verdict for the plaintiff, with 15*l.* damages; the defendants having leave to move to enter a nonsuit, if this Court should be of opinion that the conviction was valid.

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Chillon having, in Michaelmas Term last, obtained a rule accordingly—

Cresswell, Wilson, and W. M. James, now shewed cause.—This conviction is bad on two grounds. First, the adjudication is informal, being in the past tense instead of the present; *Paley on Convictions*, It ought to be in the present tense, because it is descriptive of a thing in progress; and as it stands, non constat that the word *adjudged* applies to the previous conviction in the same document, which is in the present tense. But the other objection, as to the distribution of the penalty, is of more importance. This conviction has been drawn up according to the form annexed to the stat. 1 & 2 Will. 4, c. 32, instead of that in the 5 & 6 Will. 4, c. 20, which directs a distribution of the penalty altogether different from the former act. The 37th section of the 1 & 2 Will. 4, c. 32, being absolutely repealed by the 5 & 6 Will. 4, c. 20, ss. 20, 21, the justices had no longer any power to dispose of the penalty as they have done in this case. There is no doubt that it is essential to the validity of a conviction at common law, that it should contain a specific direction for the distribution of the

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penalty, and that the party to whom it is to be paid should be pointed out; if that party be left uncertain, and it be said only that the penalty is to be paid "as the law directs," the conviction is insufficient. *Rex v. Seale*(a), *Rex v. Smith*(b). This conviction, therefore, was bad at common law, and can be sustained only by the express enactments of the statute. Then, it appears that the justices have varied from the form given by the statute, as to a matter in respect of which the latter act expressly made a new legislative enactment:—the 5 & 6 Will. 4, c. 20, expressly directs that the form of conviction shall be altered in the very respect in which they have not altered it. The conviction would be clearly bad, if the penalty were directed to be paid to a party who had no right under *either* of the acts to receive it; and it is the same in effect when it is directed to be paid to a party who had no right but under a repealed act. The conviction does not say that the money is to be received by the officer, to be by him distributed, one moiety to the prosecutor, and one moiety to the purposes in the act directed: but, as to the whole, to be by him applied according to the directions of the statute. And even if it did, the officer has no authority under the last act to receive any portion for the purpose of paying it over to the party; it must be paid directly to the party himself. [*Parke, B.*—The question is, could the overseer give a good discharge for the entire penalty, if the plaintiff wanted to come out of prison?] It is apprehended that he clearly could not. Could the plaintiff be bound to pay the whole penalty to him? [*Lord Abinger, C. B.*—Suppose the informer to have left the country.] If he had, the justices have no power under the act to appoint an agent to receive the money for him, and imprison the party till he pays it to such agent: they have no power to introduce the intervention of a third party: and if the

(a) 8 East, 568.

(b) 5 M. & Sel. 133.

offending party is bound to know the statutes, he is bound to know that the justice could not so constitute an agent, and therefore, that payment to him would be a payment in his own wrong. Suppose the officer to receive the whole penalty, and to become insolvent,—what remedy has the informer? [*Parke, B.*—The judgment of Lord *Ellenborough*, in *Rex v. Seale*, applies only to the case where payment is to be made to parties, the selection of whom is in the discretion of the justices.] Or rather, where it is to be ascertained by the evidence who those parties are. If the classes of persons who were to receive the money appeared nominatim on the face of the conviction, and then it directed that it should be paid according to the directions of the statute, that might have been sufficient. [*Parke, B.*—There must, under the 43 Geo. 3, c. 141, be some case in which a conviction, which would be quashed on application to the Court, must, while it remains unquashed, be a protection to the justices; otherwise they are in a better situation after it has been quashed than before.]

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Chilton, Evans, and E. V. Williams, contra.—If the conviction had made no mention of the overseer, but had merely directed the penalty to be applied as by law required, it would have been sufficient. *Rex v. Liston (a)*. It is true, where justices of the peace are required by a penal statute to distribute the penalty on conviction among certain persons, according to their discretion, it is otherwise; for there they are bound to adjudge what the several proportions shall be, and who are the persons to receive the penalty. *Rex v. Dempsey (b)*. So in *Rex v. Seale (c)*, where it was necessary to ascertain who was the person to whom one part of the penalty was to be paid. But those cases are clearly distinguishable from the

(a) 5 T. R. 338.

(b) 2 T. R. 96.

(c) 8 East, 568.

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present; for here the statute has distinctly pointed out who is to receive the penalty, and the magistrate has no discretion in the distribution of it; and the conviction, which orders the costs to be paid to Harries, the complainant, sufficiently points out who is the informer. It is said, however, that the conviction is wrong in directing the payment of the whole penalty to the overseer; but it is by no means clear that that is erroneous: for, in substance, it is directed to be applied according to the statute. It says, "We direct that the said sum of 3*l.* shall be paid to W. J., one of the overseers, to be by him applied according to the direction of the statute in such case made and provided." It then became his duty to apply it according to the 5 & 6 Will. 4, c. 20, s. 21, namely, one moiety to the informers, and the other to the county rate. [Lord Abinger, C. B.—It is evident that the magistrates who made this conviction did not know of the last statute, and meant it to be applied according to the provisions of the 1 & 2 Will. 4, c. 32.] The words "in such case made and provided" must mean made and provided by the last statute in force: and the statute now in force touching the application of the penalty is the statute 5 & 6 Will. 4, c. 20. *Daniel v. Phillips* (a) is an authority to shew that both these statutes may be read together. Under the former statute the justice might authorize the payment to be made to any officer of the parish, and in both statutes he is a trustee. In *Rex v. Barrett* (b), the adjudication was "*satisfaciet summam 20*l.* juxta formam statuti*," without making any distribution,—which ought to be 10*l.* to the party grieved, and 10*l.* to the poor,—and it was holden to be well enough. So, in *Rex v. Helps* (c), which was a commitment for non-payment of a penalty under the 10 Geo. 3, c. 18, which penalty was to be paid, half to the informer and half to the

(a) 1 C. M. & R. 662.

(b) 1 Salk. 383.

(c) 3 Mau. & Selw. 331.

poor of the parish where the offence was committed, it was held that the commitment was good if it shewed who the informer was and what the parish, although, upon the conviction as recited in the commitment, the informer were not named, and the justices only adjudged the penalty to be applied in such manner as the law directs. That shews that all that is necessary is to point out the informer, and to shew to whom the penalty is to be paid. It is however objected that the form is incorrect, and that the recent act directs that it shall be altered, by directing one half to be paid to the informer, and the other half only to the overseer or other officer of the parish, according to the fact: but that form is not imperatively given, and the justices may adopt one to the like effect; they are not, therefore, bound to appoint the payment to be made directly to the informer, but may order it to be paid to another person, to pay it over to the party by law entitled to receive it. The general form of conviction which is given by the 3 Geo. 4, c. 23, does not set forth the name of the party to whom the penalty is to be paid. Here the party convicted would sustain no injury from this course, because, on payment of the penalty to the gaoler, he would have discharged him.

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LORD ABINGER, C. B.—I am of opinion that the rule in this case must be discharged. I should have been glad if I could see any ground for supporting this conviction, because there has been a mere mistake, in no way connected with the merits of the case; but I cannot. All convictions before magistrates should embrace two things—first, the adjudication of the fact which forms the crime; and secondly, the pronouncing the judgment which the magistrate is empowered to pronounce upon the crime; and if either of these essentials be imperfect, then the conviction is bad. That is by the general statute for giving a summary form of

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conviction, and the statute points out the particular judgment which is to be inflicted, and which the magistrate is bound to pronounce, and by which he is bound to proceed. If the statute directs the magistrate to order the money—the amount of the fines—to be paid to certain individuals by name, that is part of his duty and a part of his judgment, and he is bound to comply with the provision. If the statute said, “on conviction of the offence the party so offending shall forfeit so much money, half to the king, and half to the informer,” the justice might have done sufficient by saying, he found the party guilty of the offence and adjudged him accordingly: if there was no specific direction that the justice should adjudge who the money should be paid to, it would be another question; but if it directed that the money should be paid to A. B., and the magistrate had not so adjudged its appropriation, then that judgment would have been wrong. Now, in this case the general statute does not help the parties, because it only applies to cases where no form of conviction is given by the particular statute, and therefore it is out of the question. There is no doubt, upon a conviction under a general act of Parliament, though the act direct that the justice should award the penalty to be paid to certain individuals, yet that general statute would help the conviction if the justice had followed the form; but that general statute is out of the question here. Then it appears by the first statute of 1 & 2 Will. 4, upon which the conviction is really founded, the judgment was that the money was to be paid to the overseers of the poor, or such other officers as the justice should direct. Is it not clear that that forms part of the judgment?—that if he convicts he is to name the overseer or other officer? Then the next statute is the 5 & 6 Will. 4; and that makes a material alteration. It says, (after reciting the former statute, which required that the justice should di-

rect that the penalties should be paid to some one of the overseers of the poor, or some other officer, as the convicting justice should direct, "to be by such overseer paid to the use of the general rate of the county, riding, or division in which such parish, &c. shall be situate,") that one moiety of the penalty shall go and be paid to the person who shall inform and prosecute for the same, and the other moiety thereof only shall go and be paid to such overseer or officer as aforesaid, and be by him applied in the manner by the said recited act directed, giving directions therefore in what manner the penalty should be applied. The magistrate is directed to pay and apply it in such a way, and that is to form part of his judgment—that one moiety shall be paid to the person who shall inform and prosecute for the same, and the other moiety only shall go and be paid to such overseer or officer as aforesaid, and be by him applied in the manner by the recited act directed;—and therefore it appears to me, since the last statute, it is a necessary part of the judgment of the magistrate that he should award and direct that one half of the penalty should be paid to the informer, and the other half to such overseer or other officer as he shall direct, for the purpose of being applied to the county rate; and for want of that judgment it appears to me the conviction is void. A conviction, like the judgment of a criminal court, (for in this point of view I can see no difference), must comply with the precise terms of the statute to make it a good conviction. In the case I put just now, where a fine is adjudged to be paid to a certain individual by name, this would be a bad judgment at common law, because the Court has no right to appoint a person to receive it for the use of another. So, in this case, suppose there had been an indictment, and the plaintiff had been tried upon it, and the judge had pronounced a sentence not conformable to the statute,—that would be bad

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on a writ of error. No writ of error can be brought on a conviction; but the matter being brought before us, we must pronounce whether it is a good judgment or not, and I am of opinion that the conviction is void by reason of the judgment not being set out as the statute directs. I am of opinion, therefore, that the verdict for the plaintiff must stand.

PARKE, B.—I am entirely of the same opinion with my Lord Chief Baron, though I certainly regret very much that we are under the necessity of discharging the rule, because this was purely a slip and oversight on the part of the magistrate, and an accident which might very well have occurred to any one even reasonably conversant with the statutes: no one could expect to find in the 5 & 6 Will. 4 this particular section, (the 20th section); but I am afraid that by his omission to look at this statute he has rendered himself liable to an action of false imprisonment. The rule of law is established, that if there be a conviction good on the face of it, the justice is protected; if the conviction is bad on the face of it, then he is not protected. By the term “bad upon the face of it,” I mean any conviction which shews a want of jurisdiction, or directs an imprisonment of a party, which the magistrate is not entitled to award. The cases have decided this. There was a difference of opinion in the Court of King’s Bench, in a case (a) which came before that Court some years ago, whether a magistrate is liable to an action of trespass when it did not appear affirmatively on the face of the conviction that he had jurisdiction: Mr. Justice Bayley differed from Mr. Justice Littledale and myself upon that question, and no judgment was ever pronounced. I take it however to be clear law, that if there is a want of jurisdiction on the face of the conviction, the magistrate is

(a) *Dimsdale v. Clarke.* 1829.

liable to an action:—and so also, if he orders an imprisonment of a different character from that which he is entitled to adjudge in point of law. *Groome v. Forrester* (a), *Robson v. Spearman* (b). Now, in this case, it appears to me that the magistrate has awarded an imprisonment of a different nature to that directed by the statute, that is, he has awarded the plaintiff to remain in prison till the fine be paid to a person who was not entitled to receive it; and it is the same in effect as if there had been an adjudication, that he should be imprisoned till he paid the penalty to a perfect stranger. The present conviction is framed upon the first statute. Under the second statute there is a difference made as to the mode in which the penalty is to be adjudicated to be paid, not in the distribution of it when paid. I agree with the argument on the part of the defendant, that if the provision of the second statute had been that the penalty should be paid to the overseer, to be by him afterwards divided, half to the parish, and half to the informer,—there would have been good ground to contend that no action of trespass would lie against the magistrate, for he would have had jurisdiction, and he would have ordered an imprisonment, till the person entitled to receive the penalty obtained it, and with the subsequent distribution of the penalty the magistrate would have had nothing to do. But it appears to me, that the true construction to be put upon the 21st section is, that the penalty is to be divided in the first instance, half to the overseer, and half to the informer; and as the magistrate has ordered an imprisonment till the whole be paid to the overseer, who is not entitled to it, a different character of imprisonment has been imposed on the plaintiff from that authorized by the statute. Upon this ground, therefore, I think an action of trespass will lie.

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(a) 5 Mau. & Selw. 314.

(b) 3 B. & Ald. 493.

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BOLLAND, B.—I am entirely of the same opinion, and think that in this case the rule should be discharged. I had for a time certain doubts on the case, upon the authority of the case of *Rex v. Thompson (a)*, but I am now of opinion that the conviction in this case cannot be sustained. *Rex v. Thompson* was the case of a conviction on the 5th Anne, c. 14, and there were several objections taken to the conviction; but the main objection was, that the evidence was not sufficiently set out so as to shew the jurisdiction of the magistrate. The part of the conviction which I allude to, and to which my attention was called, is the adjudication, and the adjudication of the penalty in that case was, “according to the form of the statute in that case made and provided,” to be distributed as the statute had directed. Now, the statute of Anne directs that the penalty shall go, half to the informer and half to the poor of the parish; but I find a distinction between the case I have alluded to and the case before us; and that is, that the statute—the second statute in this case—has particularly specified the person to whom this penalty is to be paid; and as the magistrate has not directed it to be so paid, he stands in the same situation as if he had directed it to be paid to a perfect stranger. Upon this ground, and on account of that distinction, I think the rule must be made absolute.

GURNEY, B.—I quite agree with the opinions laid down by the Lord Chief Baron and my learned brothers, for I think the direction of the statute in question is too plain to be misunderstood.

PARKE, B.—The case to which I referred in the King's Bench was *Dimsdale v. Clarke*, and the majority of the Court thought that the magistrate was liable, it not ap-

(a) 2 T. R. 18.

pearing on the face of the conviction that he had properly described his jurisdiction, for that he was liable if he did not set forth his jurisdiction; but the dictum was not agreed to by Mr. Justice Bayley, and no judgment was ever given.

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Rule discharged.

KEY v. M'INTYRE.

ADDISON opposed the justification of bail, on the ground that sufficient notice of justification had not been given. The bail were added bail under a Judge's order. They resided at Manchester, and notice was given in London on Saturday, after post time, to justify at chambers on Tuesday.—He contended that four days' notice ought to have been given. The rule of T. T. 1 Will. 4, s. 1, provides that "a defendant may justify bail at the same time that they are put in, upon giving four days' notice for that purpose, before 11 o'clock in the morning and exclusive of Sunday." He contended also that this was not even a two days' notice, as it was not given before 11 o'clock on the Saturday.

The rule of Trinity Term, 1 Will. 4, s. 1, does not apply to the case of added bail, so as to require, in such case, four days' notice of justification.

Cowling, contra.—The rule referred to only applies to town bail, because country bail cannot justify at the same time as they are put in. This case therefore depends on the former practice, under the old rule of 59 Geo. 3: and in *Harbottle v. Clark* (a), it was held, that if notice be given of country bail, who are to justify pursuant to the old practice, the four days' notice required by the rule of T. T. 1 Will. 4, need not be given. [*Parke*, B.—This is substituted bail by leave of a Judge.] Still the practice is the same.

(a) 4 Dowl. 12.

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THE COURT in the first instance rejected the bail, it appearing that the notice was that the bail would "justify," not "add and justify;" saying, that the defendant clearly could not put in and justify bail at the same time, unless a previous four days' notice had been given. But the case of *Perry's Bail* (a) being subsequently referred to, where it was decided that "where bail are changed by leave of the Court or a Judge, they are not considered as new bail, so as to require a four days' notice," the bail were allowed.

(a) 2 C. & J. 475; 1 Dowl. 564. having been made till the morning of justification, the plaintiff might have time, if he pleased, to inquire into the sufficiency of the bail.

HOUSEGO v. COWNE.

A person, sent by the holder of a dishonoured bill of exchange, called at the drawer's house the day after it became due, and there saw his wife, and told her that he had brought back the bill that had been dishonoured. She said she knew nothing about it, but would tell her husband of it when he came home. The party then went away, not leaving any written notice:—*Held*, sufficient notice of dishonour.

ASSUMPSIT by the indorsee against the drawer of a bill of exchange. Plea, no notice of dishonour, and issue thereon.

At the trial before the under-sheriff of Middlesex, a witness was called for the plaintiff, who proved that he took the bill to the defendant's house, where he saw his wife, and told her that he had brought back the bill which had been dishonoured. She said she did not know any thing about it, but that she would tell her husband of it when he came home. The witness then came away, without leaving any written notice of dishonour. The under-sheriff having held this to be sufficient proof of notice,

Humfrey now moved for a new trial, on the ground that the proof was insufficient. He cited *Solarte v. Palmer* (b), and *Hartley v. Case* (c). [*Parke, B.*—This is a very different

(b) 1 Bing. N. C. 194; 1 Scott, 1.

(c) 2 B. & Cr. 339.

case from *Solarte v. Palmer*. In *Woodthorpe v. Lawes* (a), this Court held a notice of dishonour to be sufficient, though it did not state on whose behalf payment was applied for, or where the bill was lying]. As the defendant was not himself seen, a written notice ought to have been left; the verbal message might be misrepresented. [Lord Abinger, C. B.—The wife would be as likely to deliver a verbal notice as a written one. Parke, B.—The sending a verbal notice to a merchant's country house during the hours of business, is sufficient, though no one is there.] It is assumed in that case that the merchant undertakes to have some one there during those hours. [Bolland, B.—So, a person not a merchant, who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it may become due.]

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Per Curiam,

Rule refused.

(a) 2 M. & W. 109.

NORMAN v. WESCOMBE and Another.

TRESPASS for breaking and entering the plaintiff's dwelling-house, on the 20th of April, 1836. Pleas, first, Trespass for breaking and entering the plaintiff's

dwelling-house, and taking away certain goods. Plea, that one W. F., before the said time when &c., held a certain dwelling-house as tenant to the defendant at the rent of 8*l.*; and that just before the said time when &c., the sum of 8*l.* of the rent aforesaid was due from the said W. F. to the defendant; and that afterwards, and within thirty days next before the said time when &c., the said W. F. fraudulently and clandestinely carried and conveyed away his goods, to prevent the defendant from distraining the same, to the dwelling-house of the plaintiff, without leaving any other goods sufficient to satisfy the said arrears of rent, whereon the defendant could distrain; that the defendant requested the plaintiff to allow him to search his house for the goods so clandestinely removed, which the plaintiff refused to do; and that thereupon he the defendant obtained a search-warrant from a justice &c., under and by virtue of which he entered the plaintiff's dwelling-house, for the purpose of searching for the said goods, which was the trespass of which the plaintiff complained. The plaintiff now assigned that the action was brought, not for the trespass in the plea mentioned, but for breaking and entering the house on another and different occasion, and at another and different part of the same day. The defendant pleaded to the new assignment, that W. F. was his tenant at the rent of 8*l.*, and that 8*l.* rent for one year was in arrear; that W. F. had fraudulently removed his goods, to prevent a distress, to the plaintiff's house; therefore he entered to take them; to which the plaintiff replied, *de injuriâ*. At the trial, it was proved that W. F.'s goods had been fraudulently removed to the plaintiff's house, to avoid the distress; but no evidence was given of any demise at the rent stated, or of the rent in arrear:—*Held*, that these facts were not admitted by the new assignment, and ought to have been proved.

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not guilty; secondly, that one William Freke, before the said time when, &c., to wit, on the 25th day of March, 1836, and for a long space of time then last past, and from thence until and at the said time when, &c., held and enjoyed certain premises, to wit, a certain dwelling-house with the appurtenances, of the defendant Thomas Wescombe, situate in the parish of Crowcombe in the county aforesaid, as tenant thereof to the defendant T. Wescombe, under and by virtue of a certain demise thereof before then made by the defendant T. W. to the said W. Freke, upon which said demise a certain yearly rent, to wit, the rent or sum of 8*l*., was reserved and made payable by the said W. F. to the defendant T. W. And the defendants further said, that just before the said time when, &c., to wit, on the day and year last aforesaid, a large sum of money, to wit, the sum of 8*l*. of the rent aforesaid, for one year of the said demise ending and ended on the day and year aforesaid, was due and owing and was payable from the said W. F. to the defendant T. W., and from thence until and at the said time when, &c., remained and continued due, in arrear, and unpaid. And the defendants in fact further said, that just before the said time when, &c., that is to say, after the said rent became and was due and payable, and while the same was actually due, in arrear, and unpaid, and within thirty days next before the said time when, &c., to wit, on the 19th day of April in the year aforesaid, the said W. F. fraudulently and clandestinely conveyed away and carried, and caused to be conveyed away and carried, off and from the said premises so held and enjoyed by him the said W. F., as such tenant thereof to the said defendant T. W. as aforesaid, and the said rent of and for which was so due and in arrear as aforesaid, certain goods and chattels, to wit, &c. being the property, goods, and chattels of the said W. F., to prevent the defendant T. W. from distraining the same for the said rent so before and at the time of the said re-

moval actually due, in arrear, and unpaid as aforesaid, and for that purpose conveyed the said goods and chattels to the said dwelling-house in which, &c., without leaving any other goods and chattels on the said premises so held by the said W. F. as aforesaid, sufficient to satisfy the said arrears of rent, whereon the defendant T. W. could and might distrain for such arrears of rent as aforesaid. And the defendants further said, that before the making and giving the information and granting the warrant hereinafter mentioned, and before the said time when, &c., to wit, on the day and year last aforesaid, the defendant T. W. requested the plaintiff to permit, suffer, and allow him to enter the said dwelling-house in which, &c., in order to seize and take the said goods and chattels of the said W. F. which had been so fraudulently and clandestinely conveyed away and carried off and from the said premises so held and enjoyed by the said W. F., as such tenant thereof to the defendant T. W. as aforesaid, and for and in respect of which such rent was due and in arrear as aforesaid, and which goods and chattels had been so conveyed to and into the said dwelling-house in which, &c., as a distress for such arrears of rent as aforesaid, which the plaintiff then refused to do.—The plea then stated an application to two magistrates for a warrant to search the plaintiff's house, and the granting of the warrant, (which was set out), by which the justices commanded the constables and peace-officers of Crowcombe to aid and assist the defendant, T. W., or other person empowered to take and seize as a distress for rent the said goods and chattels, in the day-time, to break open and enter into the said dwelling-house and premises of the plaintiff, and to take and seize the said goods and chattels for the said arrears of rent, according to law. The plea then averred, that the house of the plaintiff in the warrant mentioned was the said dwelling house in which, &c., and that the goods and chattels in the warrant mentioned were the goods and

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chattels of the said W. Freke, which had been so fraudulently and clandestinely conveyed away and carried off and from the said premises so held and enjoyed by the said W. Freke as tenant thereof to the defendant T. W., and in respect of the occupation of which premises the said arrears of rent were so due and in arrear as aforesaid, and which had been so conveyed into the said dwelling-house in which, &c.:—it then alleged the delivery of the warrant to the defendant Sayer, who then and from thence until and at and after the said time when, &c., was constable and one of the peace-officers of the said parish of Crowcombe, to be executed in due form of law; and because there were not any other goods and chattels on the said premises so held by the said W. F., as tenant to the defendant T. W., sufficient to satisfy the said arrears of rent, which the said T. W. could or might seize or distrain for such amount of rent, and because the said rent still remained in arrear and unpaid, and because there was no sufficient distress upon the said premises, &c., and because the said last-mentioned goods and chattels, which had been so fraudulently and clandestinely conveyed away and carried off by the said W. F. as aforesaid, still remained and were in the said dwelling-house in which, &c., to which the same had been so conveyed, the defendants, to wit, the said T. W., so being the person to whom the said arrears of rent were so due, and the defendant Sayer as such constable, and by his command, in his aid and assistance, under and by virtue of the said warrant, after and whilst the rent so remained due and in arrear, and within thirty days next after the said goods and chattels were and had been so fraudulently conveyed away and carried off as aforesaid, viz. at the said time when, &c., entered the said dwelling-house in which, &c., the outer door thereof being then open, in order to search for, seize, and take the said last-mentioned goods and chattels so being in the said dwelling-house in which, &c., and which had been so

fraudulently and clandestinely carried away, as a distress for the said arrears of rent so due, &c., and for that purpose and on that occasion stayed and continued therein in order to search for and seize and take the said goods and chattels as a distress as aforesaid, the same being a reasonable time in that behalf, as they lawfully might for the cause aforesaid, &c. &c.

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Replication to the last plea, that the plaintiff issued his writ of summons in this suit, and declared thereupon, not for the said several trespasses in the introductory part of that plea mentioned, but for that the defendants, on the day and year in the declaration mentioned, with force and arms, &c., upon another and different occasion, and upon another and different part of the said day from that in the plea supposed, broke and entered the said dwelling-house of the plaintiff, as in the declaration alleged, and then made a great noise, &c., therein, and stayed and continued therein making such noise, &c., for a long space of time, to wit, for the space of six hours, in manner and form as the plaintiff hath above in his declaration complained against the defendants, which said trespasses above newly assigned are other and different trespasses, &c. Verification.

Pleas to the new assignment,—1st, Not guilty; 2ndly, that the said W. Freke, before the said time when &c. above newly assigned, to wit, on the 25th day of March, 1836, and for a long space of time then last past, and from thence until and at the said time when &c. above newly assigned, held and enjoyed certain premises, to wit, a certain dwelling-house with the appurtenances, of the defendant T. W., situate in the parish of Crowcombe aforesaid, as tenant thereof to the defendant T. W., under and by virtue of a certain demise thereof before then made by the defendant T. W. to the said W. F., upon which demise a certain yearly rent, to wit, the rent or sum of 8*l.*,

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was reserved and made payable by the said W. F. to the defendant T. W. And the defendants further said, that just before the said time when &c. above newly assigned, to wit, on the day and year last aforesaid, a large sum of money, to wit, 8*l.* of the rent aforesaid, for one year of the said demise ending and ended on the day and year last aforesaid and then elapsed, was due and owing and payable by the said W. F. to the said T. W., and from thence until and at the said time when &c. above newly assigned, remained and continued due and in arrear; and that just before the said time when &c. above newly assigned, and after the said rent had become and was due and in arrear, and remained actually due, and within thirty days next before the said time when &c. above newly assigned, to wit, on the 19th of April in the year aforesaid, the said W. F. fraudulently and clandestinely conveyed away and carried, and caused to be conveyed &c. off and from the said premises so held and enjoyed by him the said W. F. as tenant thereof to the defendant T. W. as aforesaid, and the rent of and for which was so due and in arrear as aforesaid, certain goods and chattels, to wit, &c., to prevent the said T. W. from distraining the same for the said rent so before and at the time of the said fraudulent and clandestine removal actually due and in arrear and unpaid as aforesaid, and for that purpose conveyed the said goods and chattels to the said dwelling-house in which &c.: and because the said goods and chattels which had been so fraudulently &c. conveyed away and carried off by the said W. F. as aforesaid still remained in the said dwelling-house in which &c., to wit, the same as aforesaid, the defendant T. W., in his own right, and the said W. S., as the servant of the said T. W., and by his command, and also as a constable, &c. (justifying the trespasses newly assigned for the purpose of taking the goods as a distress for rent.)

Replication, de injuriâ.

At the trial before *Williams, J.*, at the last Summer Assizes for the county of Somerset, it appeared in evidence that William Freke's goods had been removed to the plaintiff's house to avoid a distress for rent; that the defendant Wescombe, who was landlord of the plaintiff's premises, as well as Freke's, went to the plaintiff's house, by the plaintiff's licence, on the 19th of April, and had a conversation with the plaintiff's daughter, when he demanded the goods; that on the 20th he came again, with the defendant Sayer, at 11 o'clock in the morning; that Wescombe went to get a warrant, leaving Sayer there; but during his absence Sayer was pushed out: when Wescombe returned with the warrant, they both entered under the warrant, at one o'clock in the day. There was no proof of any demise at a rent of 8*l.* a year, as stated in the defendants' plea, or that there were any arrears of rent due, but the defendants' counsel insisted that those facts were admitted by the new assignment; and the jury found a verdict for the defendants. *Crowder*, in Michaelmas Term last, obtained a rule to shew cause why this verdict should not be set aside, on the ground that the defendant had not proved his plea. Against which rule—

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Erle now shewed cause.—There is an admission on the pleadings of the facts stated in the defendants' plea, and therefore it was not necessary to prove any demise at the rent stated, or the rent in arrear, as that was admitted on the record. The case of *House v. Thames Commissioners* (a) shews that the plea to a new assignment is construed with reference to the plea to the declaration. Here it is alleged in the plea to the declaration that there had been a demise, and that rent was in arrear: the new assignment admits those allegations to be true. In the plea to the new assignment, a demise and rent in arrear are again alleged,

(a) 3 Brod. & B. 117.

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and in support thereof the plea to the declaration is adduced, with parol evidence to shew that it relates to the same premises, the same day, the same rent, under the same demise, as are mentioned in the plea to the declaration. If the new assignment admits the facts alleged in the plea to the declaration, this proof was sufficient; and it is contended that the new assignment does so admit. In continuous pleadings, that which is not traversed is admitted: a declaration in trespass, justification, new assignment, and plea to the new assignment, are continuous pleadings; and it is clear that the new assignment does not traverse the justification, but acknowledges its truth. In 1 Saunders, 299, a, it is said: "The plaintiff cannot new assign unless there have been two assaults &c. at least committed upon him; for the new assignment is an *acknowledgment* by the plaintiff that the defendant has justified one assault." There is a great distinction between collateral and continuous pleas. In *Oakley v. Davis* (a), where, in trespass for an assault and false imprisonment, the defendant having justified the assault and imprisonment under a writ sued out by him, as attorney of J. M., against the defendant, which was delivered to the sheriff, who, by virtue thereof, arrested and detained the plaintiff; it was held, that if the plaintiff, instead of traversing the plea, as he ought to do if the arrest were irregularly made by the sheriff's officer without a sufficient warrant from the sheriff, new assign that the trespass complained of was upon another and different occasion than that stated in the plea, and after the supposed arrest therein mentioned, the defendant, on proof of the fact as before stated, was entitled to a verdict. And Lord *Ellenborough*, in the course of the argument, says (b)—"How could the plaintiff new assign upon the trespass stated and justified by the

(a) 16 East, 82.

(b) P. 86.

plea, when he might have traversed the fact pleaded? The new assignment admits that the declaration stands well answered by the plea." [Parke, B.—There is no proof of any tenancy. You must prove, under the issue on the new assignment, that Freke was tenant at the precise part of the day on which the plaintiff proves the entry into his house to have taken place. This record, with the parol evidence to apply it, is evidence of the tenancy stated in the plea to the new assignment.] Suppose the case of trespass quare clausum fregit brought for breaking and entering the plaintiff's close, and the defendant justified under a right of way,—if the plaintiff new assigned extra viam, that would be an admission of the right of way pleaded, and the defendant would be entitled to use that plea as an admission of his right of way. Here it is admitted by the replication, that on the 19th of April Freke was tenant, that the rent was due, and that the goods were removed to the plaintiff's house to avoid a distress. If, in an action of assault, the defendant justifies the assault, and the plaintiff new assigns, if but one assault is proved, the justification is admitted, and the defendant would be entitled to a verdict. [Lord Abinger, C. B.—You are seeking to help out the admission on the pleadings by the parol evidence. Parke, B.—Are you at liberty to use parol evidence to apply the admission on the pleadings to the facts of the case?] Yes, to apply the parol evidence so as to shew what were the premises mentioned in the plea. [Parke, B.—There is no question that you cannot call in aid an admission in one plea to aid another plea.] No; but where they are one continued series of pleadings, and not collateral pleas, you may do so. Suppose the plaintiff had alleged in his declaration that the defendants broke and entered his dwelling-house at one o'clock, which the defendants could justify; but the plaintiff, in his replication, had said, I did not go for that entry, but for an entry at eleven o'clock; the justification

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before pleaded would be admitted on the record, and that would contain the facts of the tenancy of Freke, the rent due, and the removal of the goods. [Lord *Abinger*, C.B.—Suppose, before the statute of Anne, the plaintiff declared in trespass in two counts, and you had pleaded a justification as to one, and the plaintiff had admitted it; and you had pleaded a second justification as to the other count, which he had taken issue upon. The plea which was admitted would be as though it were struck out of the record, and you would go to trial only as to the other. It appears to me that the question on the new assignment is just the same. You do not go to try anything on that first plea; it is the same for this purpose as if it were struck out of the record.] There the two counts are the same as two actions; they may be treated as separate collateral lines of pleading; but if they are as two actions, it is not conceded that the admission in one could not be used in the other, with parol evidence to apply it. Suppose the plaintiff brought two separate actions for entering his dwelling-house, to one of which the defendant pleaded the entry under the warrant, as in this first plea, and to the other the plea to the new assignment, and the jury found for the defendant in one of the actions,—he could make use of that record in the other action, and shew that the premises were the same, that it was on the same day, and that it was for one removal of goods that he entered. [*Parke*, B.—Suppose the plaintiff had, in the first count, declared for an entry at one o'clock, and you had pleaded a justification under the warrant, and the plaintiff had entered a nolle prosequi as to that, and that he had declared in the second count for an entry at ten o'clock, and you had pleaded a justification containing the same facts,—the question is, could you avail yourself of the admission in the first plea to aid the other?] It is not admitted that it could not be done; but if it could not, such a case is distinguishable from the present. But it is submitted that the ad-

mission might be used. Suppose, in an action on a bill of exchange, with a count for goods sold, (being the consideration for which the bill was given), the defendant, to the count on the bill, pleads satisfaction, and to the count for goods sold payment, and to the latter count the plaintiff enters a nolle prosequi,—the defendant might shew that the consideration for the bill was the goods sold, which the plaintiff admitted had been paid for.

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Crowder and Ball contra.—The defendants' plea to the new assignment has not been established. It is a fallacy to say that the plaintiff, by new assigning, admits the facts set out in the defendants' plea. All that it amounts to is this—"You say that I, the plaintiff, brought my action for your entering my house under the search-warrant at one o'clock in the day; but you are mistaken; I brought my action for another and a different entry; you came at a different hour than the one you allude to and justify; I neither admit nor deny what you allege." Then the defendant says that Freke was tenant—that rent was due—that the goods had been removed, and that he had a right to enter to take them: on this the plaintiff takes issue, by which he requires the defendants to prove what they have so alleged. There is no admission whatever; the facts are neither admitted nor denied. In the case put of a right of way, there is a clear admission of a right of way, and the plaintiff says you went out of *that* way; but here there is no connexion whatever between the two entries. So, in the case of two separate actions of trespass, and a justification under a warrant, which is found in one of the actions for the defendant, it cannot be denied that the action being between the same parties, the verdict in the one case would be evidence in the other. But this case is quite distinguishable. Here the plaintiff says, I complain not of what you justify, but of another thing altogether different. There might have been two sets of premises held by Freke,

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and two rents, and if this were to be taken to be an admission, it would be a hardship upon the plaintiff. Again, in the case put of an action on a bill of exchange, and for goods sold, the admission would not be conclusive unless the fact were found by a jury. But this is altogether an avoidance, which does not amount to a *nolle prosequi*. The plaintiff does not say, I have made a mistake, but says, I never intended to bring my action for that which you suppose.

Lord ABINGER, C. B.—In this case, which has been very ingeniously argued by the learned counsel for the defendant, a considerable doubt has been raised in my mind on a matter on which I had at first no doubt at all. If this case had been parallel to the case put of two separate counts, where in the pleadings to one of them certain facts were admitted; or the case of two separate actions, there being a plea to one, which was admitted, or on which there was a verdict for the defendant, I should have thought it matter for consideration whether the verdict or admission would not be evidence in support of the other count or the other action. But this is distinguishable from those cases. A new assignment does not amount to an admission of the facts alleged in the plea, but is merely an assertion that the plaintiff will not investigate the subject-matter set forth in the plea. In point of fact, it is not an admission, but merely amounts to saying, “I do not choose, and never intended, to go for that trespass which you have attempted to justify.” Suppose a plaintiff declares, embracing several matters in his declaration, to one of which the defendant pleads a justification, which the plaintiff cannot deny; and he agrees to have it struck out of his declaration, and obtains an order for that purpose, and goes to trial on the other matters—that matter would be taken from the consideration of the judge and jury, and would not be evidence in support of the other issues. Here the plead-

ings previous to the new assignment are to be taken as if they were in point of fact struck out, and the defendant has no right to make use of them on the trial of the other issues.

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PARKE, B.—I agree in the opinion which has been delivered by my Lord *Abinger*. When this case was moved, I entertained no doubt upon the point, but I have been led into a doubt by taking for granted the first position with which the defendants' counsel set out, namely, that a new assignment admits the truth of the matter previously pleaded. But when we come to examine the nature of a new assignment, we shall find that it only admits another trespass, all inquiry as to which the plaintiff wholly abandons. The effect of it, as Mr. *Crowder* says, is not to amount to an admission of the facts stated in the plea, but to say that that is not the cause for which the plaintiff brought his action. The other pleadings previous to the new assignment being out of the case, the defendant cannot make use of the supposed admission of the facts stated in the plea.

BOLLAND, B., concurred.

Rule absolute.

END OF HILARY TERM.

Memoranda.

IN Hilary Vacation, Mr. Justice *Gaselee* resigned his seat on the Bench, and *Thomas Coltman*, Esq., K. C., was appointed a Judge of the Court of Common Pleas in his room, and was knighted. He was first called to the degree of the coif, and gave rings with the motto, "*Jus suum cuique.*"

Francis James Newman Rogers, of Lincoln's Inn, Esq.; *Biggs Andrews*, of the Middle Temple, Esq.; *George Chilton*, jun., of the Inner Temple, Esq.; *John Evans*, of the Inner Temple, Esq.; *Richard Budden Crowder*, of the Middle Temple, Esq.; *Francis Whitmarsh*, of Gray's Inn, Esq.; and *Charles Purton Cooper*, of Lincoln's Inn, Esq., were appointed his Majesty's Counsel; and *John Jervis*, of the Middle Temple, Esq., received a patent of precedence.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

EASTER TERM, 7 WILL. IV.

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IN Hilary Term, *Bayley* obtained a rule nisi for judgment as in case of a nonsuit in this cause. It was a town cause : issue was joined early in the vacation after Trinity Term, but no notice of trial given. The only question was, whether the rule was obtained too early.

Where issue is joined in vacation in a town cause, the defendant cannot move for judgment as in case of a nonsuit, until the *third* term after issue joined.

Heaton shewed cause, and relied on *Heale v. Curtis* (a), as an authority that the motion was made too soon. Since the new rules, the issue has no longer relation to the preceding term; the plaintiff, therefore, could not have been bound to enter the issue until Michaelmas Term; he had consequently all Hilary Term to go to trial, and there

(a) 2 M. & W. 76; 5 Dowl. P. C. 294.

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could be no default until Easter Term. No change has been made in the practice by the new rules, as to the time of moving for judgment as in a case of a nonsuit.

Bayley, *contra*, cited *Williams v. Edwards* (a), and *Harle v. Wilson* (b), and contended that the issue was still to be considered as delivered of Trinity Term, and the plaintiff therefore ought to have gone to trial in Michaelmas Term. He observed that, according to the report in Dowling, *Williams v. Edwards* did not appear to have been cited in *Heale v. Curtis* (c).

Heaton.—*Williams v. Edwards* and *Harle v. Wilson* were both country causes, which distinguishes them from the present.

THE COURT took time to consult the Judges of the other Courts, in order that the practice might be uniform; and in the present term,

PARKE, B. said—We have consulted the other Judges, and the rule in this case must be discharged, but without costs. It is to be understood that you cannot move for judgment as in case of a nonsuit, until two actual terms have elapsed after issue was joined.

Rule discharged, without costs.

(a) 1 C. M. & R. 583; 3 Dowl. P. C. 183.

(b) 3 Dowl. P. C. 658.

(c) But see 2 M. & W. 76.

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DOIDGE v. ELIZABETH BOWERS, R. W. MUNN and MARY ANN his Wife, and HENRY BOWERS.

THE first count of the declaration stated that the defendants Elizabeth Bowers, Mary Ann Munn, and H. Bowers, while the said Mary Ann was unmarried, to wit, on the 14th Sept. 1835, were indebted to the plaintiff in 300*l.* for the use and occupation of a messuage, &c., of the plaintiff, by them occupied and enjoyed:—laying the promise to pay while the defendant Mary Ann was unmarried. The second count was for half a year's rent, due at Lady Day, 1836, of a dwelling-house and premises demised by the plaintiff to the defendants Elizabeth, Mary Ann before her marriage, and Henry, on the 25th December, 1834, at a yearly rent of 90*l.*, payable quarterly. The defendants pleaded, to the first count, first, that the defendants Elizabeth, Mary Ann, and Henry did not, while the said Mary Ann was unmarried, promise as therein mentioned; secondly, payment, partly by those three defendants while the defendant Mary Ann was unmarried, and partly by the defendants Elizabeth, R. W. Munn, and Henry, of divers sums of money, in full satisfaction and discharge of all the monies in the first count mentioned, and thereby claimed for and in respect of the alleged use and occupation whilst the said Mary Ann was unmarried. To the second count the defendants pleaded, first, the general issue; secondly, a denial of the demise as in that count mentioned; thirdly, an eviction by the plaintiff before the rent claimed became due, and after the marriage of the defendants Munn and his wife; and fourthly, a determination of the demise by operation of law before the rent due at Michaelmas 1835, and an admission by the plaintiff of the receipt of the two previous quarters' rent; but it was not shewn when or by whom these latter payments were made:—*Held*, that this was not evidence from which a new yearly tenancy, on the terms of the agreement, could be inferred, so as to charge all the defendants, inasmuch as it was not shewn that the payments were made before C.'s marriage, or with her assent after her marriage.

A., B., and C., C. being an unmarried woman, entered into an agreement, dated 25th December, 1834, to take a house of the plaintiff for seven years, at a certain annual rent, payable quarterly; under which they entered. In September 1835, C. married; in December, A. became bankrupt. In an action of debt by the plaintiff against A., B., C., and C.'s husband, for two years' rent, claimed to be due under the demise contained in the above agreement, the defendants by their plea denied the demise. There was also a count for use and occupation, to which they pleaded payment of all the rent due before C.'s marriage. The defendants proved payment by A.'s assignees of the quarter's rent

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became due. The replications denied the alleged payment and eviction, and joined issue on the other pleas.

At the trial before *Parke, B.*, at the last Worcester assizes, the facts appeared to be as follows:—On the 25th December 1834, the defendants Henry Bowers, and his daughters Elizabeth and Mary Ann Bowers, entered into possession of a house and piece of land of the plaintiff's near Great Malvern, under an agreement of that date, whereby the plaintiff agreed to let, and the defendants, Henry Bowers, Elizabeth and Mary Ann Bowers, agreed to take, for the term of seven years, a newly-erected dwelling-house at Great Malvern, belonging to the plaintiff, at a yearly rent of 90*l.*, to be paid quarterly; a lease to be drawn as between landlord and tenant, and to contain the usual covenants, provisoes, and agreements, &c. This agreement was stamped with a lease stamp, and was signed by the three defendants who were parties to it, but not by the plaintiff. The house was furnished by the Bowers's, and was let to different visitors who came to Malvern during the summer. The father lived at Worcester, and the daughters sometimes resided with him, and sometimes in this house. At Christmas 1835, Henry Bowers became bankrupt; and the defendants proved that his assignees paid the quarter's rent due at Michaelmas, and that the plaintiff had admitted the receipt of the two former quarters' rent, but it did not appear when these payments had been made, or by whom. On the 15th September, 1835, Mary Ann Bowers married the defendant Munn. Some evidence was given in support of the plea of an eviction, but it did not amount to a defence on that issue. The learned judge, in summing up, stated that inasmuch as the agreement could not operate as a demise, not being signed by the plaintiff, although the payment of the quarterly rent would be evidence of an agreement for a tenancy for a year, yet there did not appear to him to be any evidence that the payments of rent were made before the marriage of the defendant Mrs. Munn, or that since her marriage

she had authorized such payments; and therefore that the defendants could not be charged as on a joint demise. He accordingly directed a verdict for the defendants on the second and fourth issues, giving the plaintiff leave to enter a verdict on those issues for 45*l*. On the other issues the plaintiff had a verdict.

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Talfourd, Serjt., now moved pursuant to the leave reserved.—The plea of payment being on the record, and the defendants having availed themselves of it by proving payments of the quarterly rent, it amounts to the same thing as if there had been an admission, out of the record, of the demise alleged in the declaration: they cannot afterwards turn round and say that they did not occupy under a joint demise. [*Parke*, B.—They put you to the proof of the demise on a separate issue, quite independent of the plea of payment. I thought the payment of the quarterly rent was evidence of a tenancy for a year, but that there was no evidence of payment by Mrs. Munn or by her authority. Then she, having entered, would be only tenant at will, unless she occupied for a year, which she did not; and I saw no evidence of anything done by her to constitute her a yearly tenant]. In *Cox v. Bent* (a), an admission by the plaintiff, who had entered on premises under an agreement for a lease, of a charge of half a year's rent in an account between him and his landlord, was held sufficient to constitute him a yearly tenant. [*Alderson*, B.—The difficulty is, that your point is not raised by the evidence. If there had been evidence of payment while she was a feme sole, it would have been for the jury to say whether she had not assented to a new contract for a quarterly holding; but that was not so].

PARKE, B.—Under the original contract no demise could be created but a mere tenancy at will. Then, in

(a) 5 Bing. 185.

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order to constitute a new tenancy, it must be shewn that all the three parties to the instrument had agreed to vary it by a new contract for a tenancy from year to year. But here there was no evidence to shew the assent of the married sister to such new contract; and for aught that appeared, the rent might have been paid after her marriage.

ALDERSON, B.—If it had been proved that the rent was paid before the marriage, it would have been evidence to go to the jury of her assent to a contract for a year's tenancy; but even then it would have been doubtful whether some more direct act of assent was not necessary.

The other Barons concurred.

Rule refused.

STEVENS v. MILLER.

All affidavits of justification of bail must comply with the form prescribed in the rule of Hilary Term, 2 Will. 4, s. 19; but if the bail justify in person, a variance from the form is no objection to their passing, but only disentitles the defendant to the costs of justification.

ON bail appearing to justify in this case, *Rathbone* opposed them on the ground of a defect in the affidavit of sufficiency, which stated that the bail were worth the sum required "above all their just debts," instead of "above *what would pay* their just debts," as directed by the rule of H. T. 2 Will. 4, s. 19.

Mansel, in support of the bail, urged that the affidavit was sufficient, being in conformity with the rule of T. T. 1 Will. 4, and the notice being put in to justify under that rule.

PARKE, B.—The later rule applies to all affidavits of justification, and parties ought to abide by it. It is not, however, an objection to the bail justifying; but the defendant will not be entitled to the costs of justification.

Bail passed, without costs.

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MARRYAT *v.* BRODERICK.

ASSUMPSIT for money had and received, brought against the defendant as clerk of the course of the Newport Pagnel races, to recover the sum of 60*l.*, the amount of certain stakes which the plaintiff alleged to have won by a horse of his; or, at all events, to recover back his own stake. Plea, non assumpsit. At the trial before *Littledale, J.*, at the last Northampton Assizes, the evidence was in substance as follows:—The plaintiff entered a horse to run for a sweepstakes for horses not thoroughbred, at the above races. A horse named Cricketbat, the property of a Mr. Shaw, came in first, the plaintiff's horse being second. Before the race was run, the plaintiff gave notice to the defendant that Cricketbat was thoroughbred, and therefore disqualified to start; and after the race, he claimed the stakes accordingly. By the rules of the races, all disputes were to be settled by the stewards, whose decision was to be final. The stewards on this occasion were Lord Charles Fitzroy and General Grosvenor, neither of whom however was present. General Grosvenor had been named a steward without his knowledge, but he stated to Lord Charles Fitzroy that he would acquiesce in whatever he might do in his capacity of steward. Lord Charles was represented at the races by a Mr. Bayley; and on the dispute arising between the plaintiff and Shaw, Mr. Bayley told them, (the defendant being also present), that he could not determine the matter, but it must be referred to Lord Charles. The question was accordingly referred to his Lordship, who submitted to the Jockey Club; they however declined to entertain it, on the ground that it was a mere question of fact, and referred it back to the decision of the stewards. Lord Charles afterwards wrote a

Semble, that a party subscribing to a legal horse-race cannot recover his stake from the stakeholder after the race has been run, and before the stakeholder has paid over the money.

At all events, he cannot recover it unless he demanded it before the race was run.

Where the rules of certain races provided that all disputes should be settled by the stewards, and two stewards had been named, one of whom, on a dispute arising as to which horse was entitled to the stakes of a race, gave his opinion in writing that the plaintiff was entitled to them:—*Held*, that the plaintiff could not recover the stakes on the award of that steward alone, although it appeared that the other steward had stated that he would acquiesce in whatever his colleague did.

To make the sole award of the latter available, it must be clearly shewn that both the disputing parties, and the stakeholder also, submitted to his sole authority.

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letter to the plaintiff, expressing his opinion that he was entitled to receive the stakes. The plaintiff also gave in evidence a letter from Mr. Shaw to Lord Charles Fitzroy, subsequently written, in which Shaw tendered certain evidence for his Lordship's consideration. No proof was given that Shaw's horse was in fact thorough-bred. It was objected for the defendant, that the letter of Lord Charles Fitzroy, on which the plaintiff relied as entitling him to receive the stakes, was no authority for that purpose, but that, to enable him to recover, there ought to have been an express award in his favour by *both* the stewards: and the learned Judge being of that opinion, directed a nonsuit.

Humfrey now moved for a new trial.—First, the plaintiff was entitled, on the evidence given at the trial, to recover the whole amount of the stakes. The decision of Lord Charles Fitzroy became, by the acquiescence of the other steward, in fact, the decision of the person having the whole authority; and being rather in the nature of a decision by a public officer than an award by a private arbitrator, it was not essential that both stewards should be express parties to it. In *Rex v. Whitaker (a)*, an apportionment of a rate made under a local drainage act, by two of three assessors appointed for the purpose pursuant to the act, was held sufficient, on the ground of its being a matter of public duty and public trust, not of private authority, like a reference or award. So here, the subscribers to the races do not themselves choose their arbitrators in case of dispute, but subscribe subject to the decision of judges—the stewards—already publicly appointed. [*Parke, B.*—It is impossible to say they have any public duty. The subscribers come in, voluntarily agreeing to the terms that in case of dispute it shall be referred to the stewards already named]. There was,

however, evidence in this case of assent by the parties that Lord Charles Fitzroy alone should determine the dispute. The defendant and Shaw were present when Bayley stated that it was to be referred to him, and did not repudiate his authority; and Shaw's letter to Lord Charles shews that *he* adopted it. [*Parke, B.*—Shaw's letter might be good evidence of an agreement by him that Lord Charles should *subsequently* make an award. As to Bayley's statement, it amounts to no more than that he would not interfere, but the parties must go to his principal]. Then, secondly, the plaintiff is at all events entitled to recover back his own stake. Either a valid award has been made by Lord Charles Fitzroy, and he is *functus officio*, or the event on which the plaintiff's stake was deposited is still undecided; and *Bate v. Cartwright* (a) is expressly in point to shew in such case the party may recover it back. If the question be not decided by the stewards, the consequence will be that the defendant, the stakeholder, will keep the stake altogether. [*Parke, B.*—No; it remains in his hands to abide the result, either of the decision of the arbitrators, or of the law. If the arbitrators have lost the power of deciding the dispute, the law will settle it. *Alderson, B.*—Wherein does a legal wager differ from any other legal agreement?—and if so, when it has been performed by one party, how can the other rescind it? In the case of an *illegal* wager I can understand the doctrine, because, if a difference arises, there is in such case no legal tribunal which can decide it. *Parke, B.*—Even supposing the plaintiff entitled to recover his own stake, at all events he ought to have demanded it back before the race was run]. So long as it remains in the hands of the stakeholder, it is submitted that it may be recovered back without any notice. It is like the case of an ordinary arbitration, where the authority of the arbitrator is, at

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common law, revocable at any time before award made. [Parke, B.—That proceeds on the principle that the authority of an arbitrator is a countermandable authority. In *Eltham v. Kingsman* (a), Lord *Ellenborough* certainly applied that principle to the case of a stakeholder, but I very much doubt its applicability].

PARKE, B.—I am of opinion that there is no ground for this rule. If there was no agreement varying the written rules of the races, there could be no valid arbitration without both the stewards concurring. To make an award by one binding, there must be clear proof that both the disputing parties—and probably also the clerk of the course—submitted to his authority; and I think there is not such proof. The conversation on the race course by no means amounted to an agreement to submit to the sole decision of Lord Charles Fitzroy; and the letter of Shaw was at most only an agreement that something should be *thereafter* done in the matter by him. The plaintiff, therefore, cannot rest his case at all on the ground of the award. The next question is, whether he is entitled to recover back his own stake. Now it was deposited to abide the event of the race, subject to the decision of the stewards. If the stewards have become incompetent to decide the question, it must be decided by the tribunal to which all matters of fact are legally referrible, namely, a jury. Even if the plaintiff had given notice in due time that he should require his stake to be returned, this being a legal horse race, I have great doubts whether it would be recoverable; the agreement being that it should be deposited to abide the event, which agreement cannot, as it seems to me, be varied without the assent of all parties. If, however, the case rested on that point, I should wish a rule to be granted, in order that it might be more fully considered,

(a) 1 B. & Ald. 682.

inasmuch as there is an authority to the contrary. But here there was no demand made, and no rescission of the contract, before the race was run; the stake, therefore, remains in the defendant's hands until it be determined by due course of law who is the winner—that is, by the stewards, if they are competent to determine it, if not, by a jury. The plaintiff may now submit the case to the stewards, if they are competent to entertain it; if not, he may bring an action, and shew himself to be the winner, by shewing that Shaw's horse was thorough-bred, and that his own was not.

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BOLLAND, B., concurred.

ALDERSON, B.—I am of the same opinion; and I certainly have great doubts whether the analogy suggested in *Eltham v. Kingsman* is a sound one: it appears to me that the authority of a stakeholder is not countermandable.

Rule refused.

HOW v. PICKARD.

CASE against a wharfinger for negligence. At the trial before Lord Abinger, C. B., at the last assizes for Lincolnshire, it appeared that the plaintiff had entrusted certain goods to the defendant, with an injunction that he was to deliver them solely to the plaintiff's own order. The goods had been afterwards sold to a third party, who deceived the defendant by stating that he had the permission of the plaintiff to receive the goods. The venue was laid in Lincolnshire. A motion had been made to change the venue to Yorkshire. It was, however, retained, on an undertaking by the plaintiff to give material evidence in Lincolnshire. The goods had been handed over by the

Where the venue has been retained in the county in which it was originally laid, on undertaking to give material evidence in that county, it is no ground of nonsuit that the plaintiff has not given material evidence in that county, unless the objection be taken at *Nisi Prius*.

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defendant to the purchaser at Gainsborough, in the county of York. The plaintiff had a verdict; and

Balguy now moved to set this verdict aside, and enter a nonsuit, on the ground that the plaintiff had not satisfied his undertaking to give material evidence in the county of Lincoln; he however intimated that he had not taken the objection at the trial.

PARKE, B.—The objection ought to have been taken at the trial. If that had been so, the plaintiff might then have given material evidence in Lincolnshire.

The rest of the Court concurred.

Rule refused.

DOE *d.* LORD DINORBEN *v.* ROE.

In ejectment, service of the declaration on a servant of the tenant on the premises, is, of itself, insufficient to entitle the plaintiff even to a rule nisi for judgment against the casual ejector.

RAINES moved for judgment against the casual ejector. The service was on a female servant of the tenant in possession, on the premises. He submitted that this was sufficient to entitle him to a rule nisi.

ALDERSON, B.—No; the service must be either on the tenant himself, or on his wife when living with him, or on some other party, with an acknowledgement by the tenant that he has received the declaration before the term.

Rule refused (a).

• (a) See *Doe d. Read v. Roe*, 1 M. & W. 633.

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1837.**EDWARDS v. BREWER and Another, Assignees of CARTER,
a Bankrupt.**

THIS was an issue directed by this Court under the Interpleader Act, to try whether the plaintiff had a right to the possession of certain iron pipes, lying at a certain place called Griffin's wharf, as against the defendants, as assignees of Alfred Carter, a bankrupt. At the trial before Lord *Abinger*, C. B., at the London sittings after Hilary Term, the facts proved were as follows:—

In May 1835, the plaintiff, an iron-merchant at Newport, Monmouthshire, contracted to sell to Carter, the bankrupt, who then carried on business as a wholesale ironmonger in London, 550 iron pipes, to be delivered in the river Thames, at 7*l.* 5*s.* per ton; payment by acceptance in six months. Of these, 331 pipes, weighing 37 tons 8 cwt. 14 lbs., were delivered in July following, and Carter accepted a bill for their value. In September, the plaintiff shipped the remaining 219 pipes, weighing 28 tons, 8 cwt., on board the ship *Brunswick*, Captain Yeo, master. They arrived in the port of London on the 29th of that month. Carter having agreed to shorten the period of credit for this latter shipment, the plaintiff accordingly drew a bill on him for the value at four months, which Carter accepted, and transmitted to the plaintiff. The captain called on the day the vessel arrived at Carter's office, at Wenlock Basin, City Road, and saw his clerk, one Wyatt, who told him Carter was from home. The captain pressed him to send a craft for the pipes, and said that if he did not, he should be under the necessity of landing them at the wharf he traded to, viz. Griffin's wharf, off which the vessel was then lying. Wyatt said

A consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them in transitu on the consignee's insolvency, and retain possession of them, without tendering back the bill.

Goods were consigned to A., deliverable in the port of London at a certain price per ton. The vessel in which they were shipped arrived off the wharf at which the captain was in the habit of trading. The captain called at A.'s place of business, and saw B. his clerk, A. being from home, and pressed him to send a craft for the goods, or he should be under the necessity of landing them. After some days, B. wrote to the captain, stating that A. was from home, but he, B., thought he had better

land the goods on A.'s account. They were accordingly landed at the wharf, and entered in the wharfinger's book, with "freight and charges" set opposite to them, and not in the name of any party as consignee. While they were lying there, A. became insolvent, and they were stopped by the consignor:—*Held*, that the transitus was not determined.

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he would send a note to the wharf-office, and the captain accordingly gave instructions to the wharfinger's clerk, to open any note that might come, and to follow the instructions given in it. On the 2nd October Wyatt sent to the wharf the following note, addressed to the captain:—

“SIR—Mr. Carter is absent from home; but I think you had better land the pipes at Griffin's wharf *on his account*.—I am, Sir, for A. Carter, your obedient servant,

“Wenlock Basin, Oct. 2d. 1835.

C. WYATT.

“Capt. Yeo, of the Brunswick, Griffin's wharf.”

The pipes were accordingly landed at Griffin's wharf on the 4th, and were entered in the wharfinger's book, by the captain's direction, with “freight and charges” set opposite to them; but not in the name of any party as consignee; the meaning of that entry being, according to the evidence of the wharfinger's clerk, that the wharfingers were to receive the freight and charges for the captain, before delivering the goods. Carter was at this time in embarrassed circumstances; and on the 8th October a fiat in bankruptcy issued against him. On the same day the wharfingers received a notice from the plaintiff to stop the goods in transitu. Wyatt stated in his examination, that at the time he wrote the above note, he knew Carter to be in difficulties; that he had no communication with him on the subject, but did it in the exercise of his own discretion. The Lord Chief Baron stated it as his opinion that, on this evidence, the plaintiff was entitled to a verdict; that the landing of the goods appeared to be for the purpose of relieving the captain, and not with an intent on the part of Carter or his agent to take the goods, and that the transitus was not determined: but he gave leave to the defendants to move to enter a verdict for them, if the Court should be of a contrary opinion: and a verdict having been found for the plaintiff,

Sir *F. Pollock* now moved, pursuant to the leave reserved.—The question raised by this issue is precisely the same as would have arisen in an action of trover brought by the plaintiff; and the evidence raises two points in favour of the defendants. First, the plaintiff, having received the bankrupt's acceptance for the goods, has no right to retake them on his becoming insolvent, without tendering back the bill. His omission to do so does not indeed preclude him from stopping the goods in transitu, but he is not entitled to the absolute possession of them without delivering up the bill, and therefore is not entitled to succeed on this issue. In *Hodgson v. Loy* (a), where it was held that part payment did not defeat the right of stoppage in transitu, the money paid had been tendered back by the consignor to the assignees of the consignee; and the postea was delivered to the former only on his agreeing to pay the money. [*Parke, B.*—The question is, whether it is a consideration precedent to the consignee's right to repossess the goods, that the bill should be tendered. Have you ever seen a case in which such a question was raised?—it is certainly new to me]. The course adopted in *Hodgson v. Loy* shews that it is not new in practice. The right of stoppage in transitu was originally a mere equitable claim—an excrescence engrafted by the courts of equity upon the legal rights of the parties. [*Parke, B.*—It is now recognised as a legal possessory right. The effect is the same as if the consignor had not delivered them on board the ship. Then if so, he has a right to retain them till payment of the whole price. Notwithstanding part payment, he has a lien on the whole of the goods for the rest of the price. *Feise v. Wray* (b)].

Secondly, the transitus was at an end in this case. Wherever a consignee accepts the goods, though not at his own place of business, and not at the place to which he means that they should ultimately go, the

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(a) 7 T. R. 440.

(b) 3 East, 93.

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transitus is determined. Here the goods were *deliverable* generally in the port of London; no general course of dealing was shewn to have existed between the parties, as to the place or mode of delivery; the question is to be determined by reference to the circumstances of the particular case. Now it is clear that the goods were landed in pursuance of Wyatt's note, which expressed that they were to be landed on account of the consignee; and although the captain stated that they were landed on account of the freight and charges, that could not be so, because under the contract they were to be delivered at a certain price per ton, and therefore there could be no demand against the *consignee* for freight or charges. That claim must have been set up at the instance, not of the ship-owner, but of the plaintiff, in order to get some hold upon the goods.

LORD ABINGER, C. B.—I thought the note from Carter's clerk was not a peremptory order, but only an expression of opinion; and that Griffin's Wharf was only a place of deposit in transitu, and not a place of reception. The captain did not choose to land the goods on the consignee's account, but directed freight to be placed against them.

PARKE, B.—I am of opinion that there ought to be no rule in this case. The assignees have no title to these goods until they have got into the hands or possession of the consignee. They were landed at Griffin's wharf, where he had not usually had his goods landed; had he then taken possession of them? The consignee is away, and his clerk says—"You had better land the goods at Griffin's wharf on my master's account." It is the same as if the clerk had not acted at all. Then, how does the captain act? He lands them, not in the consignee's name at all, but in blank, with freight and charges set against them. Then the other point is as to the bill. It is settled by the

case of *Feize v. Wray*, that by an acceptance of bills the vendor's right to stop in transitu is not taken away. The acceptance would not diminish his right to retain possession until the whole price was paid. Whether the effect of the stoppage in transitu be to rescind the contract, or merely to revest a lien, does not seem to be quite settled; *Clay v. Harrison* (a).

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BOLLAND and GURNEY, Bs., concurred.

Rule refused.

(a) 10 B. & Cr. 99.

JONES v. HOWE.

THE plaintiff having given notice of trial before the sheriff, and not having proceeded to trial pursuant to that notice, on the 10th of April gave a fresh notice of trial for the 18th. On the 14th, the defendant gave the plaintiff notice that he should move for judgment as in case of a nonsuit, and on the 15th moved for and obtained such rule. On the 18th, the cause was tried as an undefended cause, and the plaintiff had a verdict.

The plaintiff having made default, gave, on the 10th April, a fresh notice of trial before the sheriff on the 18th. On the 14th, the defendant gave notice of a motion for judgment as in case of a nonsuit, and on the 15th obtained a rule accordingly. On the 18th the cause was tried as an undefended one, and the plaintiff had a verdict. The Court set aside that verdict on payment of costs, and discharged the rule for judgment.

Hoggins now (April 22nd) shewed cause against the rule for judgment as in case of a nonsuit, and contended that, the cause having been actually tried, the defendant could not have judgment as in case of a nonsuit.

Addison, contra.—The defendant was in a situation to move for judgment as in case of a nonsuit for the first default, when this rule was applied for. It is clear that the

ment as in case of a nonsuit, with costs, on a peremptory undertaking, giving the defendant the costs of the day on the first default.

Quære, whether, since the rule of Hilary Term, 2 Will. 4, s. 68, one day's notice of motion for judgment as in case of a nonsuit can operate as a stay of proceedings in this Court?

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fresh notice of trial having been given did not preclude him from so doing; *Bainbridge v. Purvis (a)*, *Smedley v. Christie (b)*. [Parke, B.—How can you make your rule for judgment absolute, when the plaintiff has a verdict? Your notice of motion, not being a two days' notice, was no stay of proceedings in this Court.] That might be an objection to setting aside the verdict, but not to the defendant's making this rule absolute. [Alderson, B.—What would be the entry on the record? There would be on the one side a verdict for the plaintiff, on the other judgment for the defendant.] It is doubtful whether, under the rule of H. T. 2 Will. 4, s. 68, which applies to all the Courts, and renders notice of a rule nisi for judgment as in case of a nonsuit unnecessary altogether, unless where it is intended to operate as a stay of proceedings, any notice is not by implication made sufficient for that purpose.

PARKE, B.—If that be so, you should have applied to amend your rule, which was not drawn up with a stay of proceedings. The defendant may set aside the verdict on payment of costs, and this rule will be discharged with costs, on a peremptory undertaking; and it may be incorporated in the rule that the defendant shall have the costs of the day on the former default.

Rule accordingly.

(a) 1 Dowl. P. C. 444.

(b) 2 Dowl. P. C. 152.

PRITCHARD v. M'GILL.

It is not necessary, in order to entitle a defendant to enter a suggestion for costs under the Middlesex Court of Requests Act, 23 Geo. 2, c. 33, s. 19, that the plaintiff should have been resident within the jurisdiction.

DEBT for horse-meat, stabling of horses, &c., goods sold and delivered, and on an account stated. Plea, *nunquam*

The sheriff or other officer, who tries a cause under a writ of trial, has no power to certify, under the 23 Geo. 2, c. 33, s. 19, that the freehold or an act of bankruptcy was in question. If that be the case, it should be shewn for cause when the application is made to try before the sheriff, when it may be imposed as a term that he should have power to certify.

indebitatus. At the trial before the under-sheriff of Middlesex, the plaintiff had a verdict for 1*l.* 15*s.* *Thomas* obtained a rule to shew cause why a suggestion should not be entered on the record, under the Middlesex Court of Requests' Act, 23 Geo. 2, c. 33, s. 19, in order to entitle the defendant to costs, on an affidavit stating that the defendant resided in the county of Middlesex, and that the cause of action arose within the county.

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Ogle shewed cause, and urged, first, that the affidavit was insufficient, as not shewing that the plaintiff also resided within the jurisdiction of the county court.—The first section of the statute empowers the Court to examine the parties, as well plaintiffs as defendants, vivâ voce on oath; and sect. 5 authorizes the county clerk, in case either the plaintiff or defendant shall neglect to perform such orders as the Court shall from time to time pronounce, by warrant to commit such plaintiff or defendant to the county gaol for any period not exceeding three months, or until performance. In order to give any effect to these enactments, the plaintiff, as well as the defendant, must be resident within the jurisdiction. The only reason why the defendant must reside within the county is, that it is necessary for the Court to have a power of enforcing its orders against him; and the same reason applies to the plaintiff. The power of examining him is otherwise a perfect nullity. [*Alderson*, B.—Is it not presumed that the plaintiff is in court, when he has entered his plaint? The defendant must be *brought* there.] 'The plaintiff does not appear by himself, but by his attorney, and *he* is not liable to execution. The law requiring the defendant to reside within the jurisdiction is but of recent origin, having been first established in *Tubb v. Woodward* (a). [*Alderson*, B.—

(a) 6 T. R. 175. See, however, *Welch v. Troyte*, 2 H. Bl. 29; and 2 Inst. 229; Dalt. Sher. 412.

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The defendant must reside within the county, because the jurisdiction, as to him, is in invitum; that is not so as to the plaintiff, who himself comes to the Court. We are continually exercising a jurisdiction on behalf of plaintiffs resident abroad; but we have no jurisdiction over defendants who are abroad.] Every other Court of Requests Act, from the period when this statute passed until the 39 & 40 Geo. 3, c. civ., contains a provision that the plaintiff shall be resident within the jurisdiction. [Parke, B.—That is rather against you, as this act does not so provide.] It was unnecessary to do so in this case, because the Court has the same jurisdiction as the old county court.

A second objection is, that the affidavit ought to have stated that the freehold or title to the plaintiff's land, or an act of bankruptcy, did not come in question, otherwise the case may be within the exception in section 19. [Alderson, B.—There is no certificate that it did.] The undersheriff is not a judge who has power to grant one. [Parke, B.—If this is a case of that description, that should have been shewn for cause before the Judge, when the application was made to try before the sheriff; then it might have been imposed as a term that he should have the power to certify like any other judge.]

Humfrey, amicus curiæ, mentioned a case of *Wills v. Langridge*, in the Bail Court, in which *Littledale, J.*, had so decided (a).

Thomas, in support of the rule, was stopped by the Court.

PARKE, B.—As to the first point, I am clearly of opinion that the plaintiff is not entitled to succeed upon it. I find no trace of authority for the position, that the plaintiff

(a) And see *Jones v. Barnes*, ante, 313.

must reside within the jurisdiction of the county court; the authorities only shew that the defendant must reside there, and that he must be suable for the debt in the county court. Therefore, at common law, this was an action which could be tried in the county court. Then the act of Parliament only gives the Court certain powers, which it did not possess at common law, of examining the parties themselves, &c., if they can be brought before the Court; and although this is to be enforced by a process which perhaps cannot be exercised beyond the jurisdiction of the Court, that does not make it essential that the plaintiff should reside within the jurisdiction. This view is strongly confirmed by the 19th section, which deprives the plaintiff of costs in actions brought in the superior courts, where the defendant resides in the county of Middlesex, and is liable to be summoned to the county court, but says nothing about the necessity of the plaintiff's residing in the county. As to the other point, it is disposed of by the case of *Wills v. Langridge*.

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ALDERSON, B.—I think it is impossible to read the 19th section without seeing that the proper construction of the act is that which has been stated by my brother *Parke*.

BOLLAND and GURNEY, Bs., concurred.

Rule absolute.

HEALE v. ERLE.

W. H. WATSON had obtained a rule to set aside the judgment signed in this cause, so far as related to the costs, and to enter a suggestion on the record, in order to tax the defendant his costs, under the Bath Court of Requests Act, 45 Geo. 3, c. lxxvii.; the defendant paying the

Where final judgment is signed in vacation, the defendant may apply to the Court in the following term for a sugges-

tion, under a Court of Requests Act, to entitle him to costs, on condition of paying the plaintiff's costs accrued since the judgment was signed.

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plaintiff his costs incurred since the judgment was signed. It appeared that the writ of summons issued on the 17th January: the defendant not appearing, the plaintiff entered an appearance for him pursuant to the statute, and signed final judgment, on which the costs were taxed on the 25th February, and execution issued. The action was for goods sold; the contract was made in London, but the defendant was resident within the jurisdiction of the Bath Court of Requests. On the 2d March the plaintiff's attorney was served with a summons to shew cause why a suggestion should not be entered under the above act; that summons was heard on the 3d, and dismissed. On the first day of this term, the present rule was applied for, and *Bond v. Bailey* (a), and *Godson v. Lloyd* (b), were cited.

Crowder shewed cause, and contended that, after final judgment signed, the motion was too late. [*Parke*, B.—The question is, whether, the judgment having been signed in vacation, the defendant could move sooner.] He might have applied to a judge to stay proceedings, and then all further expense would have been avoided. The plaintiff could not be expected to know that the defendant was resident within the inferior jurisdiction, and entitled to the benefit of the local act.

Watson.—The plaintiff is not prejudiced, inasmuch as the rule was obtained on the condition of paying his costs since the judgment. The statute enables the Court only to grant this application.

Lord ABINGER, C. B.—I think the qualification annexed to the rule removes the difficulty. The rule will therefore be absolute.

Rule absolute.

(a) 2 C. M. & R. 426; 3 Dowl. P. C. 809. (b) 4 Dowl. P. C. 157.

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ESS v. TRUSCOTT.

ASSUMPSIT on an agreement for the sale of certain furniture and fixtures by the plaintiff to the defendant, according to a valuation to be made by one J. Crook. The declaration alleged that a valuation was made by him, according to the agreement. The defendant pleaded first, non assumpsit, and secondly, that no valuation was made by Crook; and issues were joined thereon. The cause was tried by writ of trial in the Palace Court, when it appeared that the valuation was in fact made by one Atkinson, the clerk of Crook, who was a broker. The defendant saw Atkinson valuing, and made no objection until Atkinson told him the amount of his valuation. For the defendant, it was objected that he was not bound by the contract, unless the valuation, which was a work of skill, was made personally by Crook, the party agreed on. The learned Judge reserved the point, and the plaintiff had a verdict.

In an action on an agreement for the sale of goods, at a valuation to be made by A., the issue was, whether a valuation was made by A. It appeared that the goods were in fact valued by B., A.'s clerk:—*Held*, that the defendant was not bound by it, unless it were shewn that it was agreed between the parties that B.'s valuation should be taken as A.'s; and that the fact of the defendant's seeing B. valuing, and making no objection until B. told him the amount, was not evidence of such agreement.

Gaselee having accordingly obtained a rule nisi, to enter a verdict for the defendant on the second issue,

Humfrey shewed cause.—The evidence shews that the defendant agreed to take the valuation of Atkinson, in substitution for that of Crook. [*Parke*, B.—That is not enough to support this issue; you must shew that it was agreed between the parties that Atkinson's valuation should be taken as Crook's. If it was agreed to substitute Atkinson for Crook as the valuer, the plaintiff should have declared on that substituted agreement.] If the defendant assented to Atkinson's making the valuation, Crook did, as against the defendant, value through the agency of Atkinson.

Lord ABINGER, C. B.—An employment of skill and

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discretion, such as this, cannot be deputed to another. Atkinson should, at all events, have submitted his valuation to Crook's judgment. The rule must be absolute.

PARKE, B.—I find no proof that the defendant directed Atkinson to value.

Rule absolute.

LILLEY v. JOHNSON.

Where a new trial is moved for, in a case tried before the sheriff, &c. on a writ of trial, on an affidavit verifying the sheriff's notes, affidavits are admissible on the other side, of evidence given at the trial, which does not appear on the notes.

IN this case, which was tried before the under-sheriff of Yorkshire, *Cottingham*, moving on an affidavit verifying a copy of the under-sheriff's notes, obtained a rule nisi for a new trial, on the ground that the verdict was against the evidence.

'*G. T. White* now appeared to shew cause, on affidavits containing statements of evidence given at the trial, which did not appear on the under-sheriff's notes: and *Cottingham* admitted, that if such affidavits were receivable, he could not sustain his rule.

THE COURT held the affidavits admissible, and the rule was accordingly

Discharged.

WATSON v. DORE.

Judgment signed before an appearance entered is irregular, although the defendant has given a cognovit, in which he authorizes the plaintiff's attorney to appear for him if necessary, and the attorney, on the day after judgment signed, enters an appearance nunc pro tunc.

PETERSDORFF shewed cause against a rule nisi for setting aside the judgment signed in this cause for irregularity, as having been signed before any appearance entered. The defendant not having entered an appearance in due time, the plaintiff, on the 2d March, signed judgment.

On the 3rd an appearance was entered by the plaintiff's attorney for the defendant, nunc pro tunc. The defendant had given a cognovit, in which he authorized the plaintiff's attorney to appear for him, if necessary.

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Petersdorff urged that the irregularity was waived by the subsequent entering of the appearance. In *Davis v. Hughes* (a), where a judgment was irregularly signed without filing common bail for the defendant in due time, the defendant was held to be estopped from objecting to the irregularity, having given a cognovit, and the plaintiff having, before the objection was made, filed common bail nunc pro tunc. [*Parke, B.*—There was then a relation to the first day of the term.] It is stated here that the appearance was entered nunc pro tunc; it must therefore be taken to be entered of the 2d March. [*Parke, B.*—The consequence of the rule that judgments shall have no relation, is that there is no relation as to appearances. It could not be so entered without a judge's order.] Then the defendant having by the cognovit authorized the plaintiff's attorney to appear for him, he cannot object to the act of his own agent, so as to neutralize the judgment which he has himself authorized.

PARKE, B.—The plaintiff's attorney ought not to have signed judgment until an appearance was entered by somebody. The irregularity is in signing judgment *before* appearance.

Per Curiam,

Rule absolute, with costs; no action to be brought.

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FIELD v. SMITH.

If the sheriff levies and sells goods of a defendant under a fieri facias, and, after notice that the defendant has petitioned the Insolvent Debtors' Court, returns fieri feci, he is bound by that return, and must pay over the money to the plaintiff, although the defendant is afterwards discharged under the Insolvent Act.

HANCE had obtained a rule, calling on the sheriff of Shropshire to shew cause why he should not pay over to the plaintiff a sum of 14*l.* 7*s.*, which he had levied under a fi. fa. issued against the defendant in this cause. The fi. fa. was sued out on the 18th January; the levy was made on the 27th; on the 21st February the sheriff was ruled to return the writ; on the 1st March he returned fieri feci. It appeared also that on the 28th November preceding the defendant petitioned the Insolvent Debtors' Court for his discharge under the act, and made the usual assignment of his effects to the provisional assignee of the Court; on the 4th February he gave the sheriff notice that he had petitioned the Insolvent Court, and on the 8th April he was discharged under the Insolvent Act.

W. H. Watson shewed cause.—When the sheriff made his return, the defendant had only a *defeasible* title to the goods, which was defeated by his discharge under the Insolvent Act. Under these circumstances, the sheriff's return is not to be taken as conclusive against him. In *Brydges v. Walford* (a), where the sheriff returned to a fi. fa. against a defendant that he had levied, it was held, in an action against the sheriff for not paying over the money, that, notwithstanding his return, he might be admitted to prove that the defendant became bankrupt before the judgment, and the plaintiff knew his insolvency at the time of action brought: and *Bayley, J.*, says, "The sheriff says they are the goods of Collier at the time when he made his return. Now Collier had a defeasible title at that time, which has since been defeated." [*Parke, B.*—That is a

(a) 6 M. & Sel. 42.

different case from the present, because here the sheriff could have ascertained, by application to the Insolvent Debtors' Court, that the defendant had assigned to the provisional assignee.] That assignment is subject to a condition, in case the party shall be discharged under the act. [*Parke, B.*—It is good while it lasts, until defeated by the Court's refusing the discharge. The return was a right return when it was made.] It may be said the sheriff ought to have come to the Court for relief under the Interpleader Act: no doubt he might, but he was not bound to do so. [*Parke, B.*—You are now applying for the equitable interference of the Court; it may therefore reasonably be objected to you that you ought to have applied for relief earlier, under the Interpleader Act.] The argument on the part of the sheriff is, that he is legally entitled to retain the money as against the plaintiff. It is clear that it now belongs to the assignee.

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Hance, contra.—The sheriff is concluded by his return. Having received notice from the defendant that he had petitioned the Insolvent Court, he might have returned nulla bona, or applied to the Court to enlarge the time for making his return until he could obtain an indemnity; but having taken upon himself to return fieri feci, the plaintiff might the next day have brought an action against him on that return, because he admits by it that he has money of the plaintiff's in his hands, which he has not paid over.

PARKE, B.—If the sheriff had used due diligence, he might have discovered that the defendant had no goods at all. Having notice that the party was going to take the benefit of the Insolvent Act, he might have searched, and would have found that the defendant had made the assignment to the provisional assignee, and therefore had ceased to have any property in the goods. It was his

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own laches that he did not obtain such information; and the case is therefore distinguishable from *Brydges v. Walford*, in which, if the sheriff had used due diligence, he could not have made any other return. He has consequently concluded himself by his return, and must pay over the money: he had an opportunity of relieving himself from responsibility, and not having done so, he is bound.

The rest of the Court concurred.

Rule absolute, with costs.

—◆—
DONCASTER v. CARDWELL.

Where a plaintiff avails himself of the terms of short notice of trial, he has no power of countermand; and therefore, if he does not proceed to trial, he must pay costs up to the time of the countermand.

ADDISON shewed cause against a rule nisi for judgment as in case of a nonsuit. It was agreed that the rule should be discharged on a peremptory undertaking, and the only question was, whether the rule should provide for payment of the costs of the day. It appeared from the affidavits, that on the 17th March, notice of trial was given for the Liverpool Assizes, the commission day being the 25th; that notice was countermanded on the 21st. *Addison* contended, that inasmuch as the defendant (as must be taken to be the case) was under terms to accept short notice of trial, six days' notice of countermand was not necessary. The rule of H. T. 2 W. 4, s. 61, which provided that, in country causes, six days' notice of countermand should be given, *unless* short notice of trial had been given, implied that where short notice of trial was given, a shorter notice of countermand was sufficient. [*Alderson*, B.—It may also imply that there can be none at all in such case.]

PARKE, B.—The Master informs us that that is the practice; that if the plaintiff avails himself of the terms of

short notice of trial, he has no power of countermand; and therefore he must pay costs up to the time of the countermand.

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Rule accordingly.

PLATT v. HALL.

THIS was an action of indebitatus assumpsit, to which the defendant pleaded, first, non assumpsit; and secondly, a set-off.

The cause stood for trial at the Liverpool Summer Assizes, 1836, when a verdict was taken for the plaintiff for 2000*l.*, subject to be reduced or vacated, and a nonsuit or verdict to be entered for the defendant, according to the award of a barrister, to whom the cause and all matters in difference were referred.

The arbitrator awarded that the plaintiff was entitled to demand of the defendant the sum of 90*l.* in respect of the causes of action in the declaration mentioned, and that the defendant was entitled to set off the sum of 35*l.* in respect of the matters mentioned in the second plea and in the notice of set-off; that the defendant was not entitled to set off any sum for commission; and that the defendant should deliver up to the plaintiff certain securities mentioned in the award.

Crompton had obtained a rule to shew cause why the postea should not be delivered to the plaintiff, with liberty to him to enter a verdict for the sum of 55*l.*, pursuant to the award of the arbitrator. The rule was drawn up "on reading the affidavit of J. C. (the arbitrator's clerk), and the *paper writing* thereunto annexed." The affidavit verified

Where a verdict was taken for the plaintiff, subject to a reference of the cause and all matters in difference, the arbitrator having power to vacate the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand of the defendant 90*l.* in respect of the causes of action, and that the defendant was entitled to set off 35*l.* in respect of his journeys, &c. mentioned in the plea and notice of set-off, and that the defendant should deliver up certain securities to the plaintiff:—*Held*, that the award sufficiently ascertained the amount for which the verdict was to be entered.

A rule for delivering the postea to the plaintiff, that he might enter the verdict pursuant to the award of an arbitrator, may be drawn up on reading the affidavit "and the *paper writing* thereunto annexed," provided the affidavit verify the *paper writing* as being a copy of the award.

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the "paper writing" as being a copy of the award made in the cause.

Willmore shewed cause, and objected in the first place that the rule was not in the proper form, but that it ought to have been drawn up on reading the affidavit, and the copy of the award thereunto annexed; and cited *Sherry v. Oke* (a), as an authority that the nature of the document annexed must be specified in the rule. [*Parke, B.*—That case proceeded on the ground that it did not appear by affidavit that the paper writing annexed was in fact a copy of the award; here it does (b).]

Then the award is not certain or final. The arbitrator has neither vacated the verdict nor reduced the damages, and has not in terms ascertained any sum as being due from the defendant to the plaintiff. He ought to have expressly determined for what amount the verdict was to stand. Besides, he only states that the plaintiff had a ground of action for 90*l.*, not that on the whole he is entitled to receive that sum. It is consistent with the earlier part of the award, that after the securities have been delivered up, the plaintiff may be the debtor of the defendant.

PARKE, B.—The arbitrator has settled all the pecuniary demands at once, by saying that the plaintiff has due to him 90*l.*, and that the defendant is entitled to set off 35*l.*; all that remains is to deduct the one sum from the other. The award is quite sufficient.

Rule absolute.

(a) 3 Dowl. P. C.; 1 Harr. & Woll. 119.

(b) See *Hayward v. Phillips*, 1 Nev. & Per. 293.

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RYLAND v. WORMALD.

CHANDLESS shewed cause against a rule which had been obtained for setting aside the judgment signed in this cause, for irregularity. The declaration was delivered on the 8th March; on the 13th, (the 12th being Sunday), a plea in abatement was delivered. The question was, whether this was in time. *Chandleless* contended, that notwithstanding the rule of H. T. 2 Will. 4, (viii.), pleas in abatement continued subject to the old practice, and must be delivered within four days, inclusive of both the first and last. The invariable practice had in fact been, since the new rule, to plead them within that time, and it was so laid down in the last edition of Archbold's Practice (a). The rule was framed in order to assimilate the cases in which the days were reckoned exclusive and inclusive, and those in which they were reckoned clear days, and did not contemplate the present case. [*Parke, B.*—It uses words which, according to their grammatical meaning, comprise this case.] There are many cases in which unqualified words have been held not to include cases standing on a peculiar ground. Thus, in *Simson v. Moss* (b), the general words of the Hawkers and Pedlars Act were held not to make the licence available in a borough where, by a by-law made pursuant to charter and custom, strangers were not permitted to trade. It has always been laid down that pleas in abatement are not to be favoured; *Long v. Miller* (c), *Jennings v. Webb* (d). The object of the rules was rather to make the practice of the several courts uniform, than to introduce alterations.

PARKE, B.—Whether the case of pleas in abatement

(a) 3rd edition, p. 470.

(b) 2 B. & Ald. 543.

(c) 2 Stra. 1192.

(d) 1 T. R. 277.

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was in the contemplation of the framers of the rule or not, I do not know; but they have used words which, by their grammatical construction, include them: that construction leads to no absurdity, but the contrary; and when that is the case, the best rule is to construe the words according to their grammatical import.

ALDERSON, B.—Such a mode of construction has a great tendency to simplify the practice; whereas encouraging exceptions to a general rule has a tendency to create doubt and litigation. The object of the first class of rules of H. T. 2 Will. 4, was to make the practice uniform; then others were introduced to alter the practice, and this is one of them.

Cowling, in support of the rule, applied that the rule might be absolute with costs, inasmuch as the question of the construction of the rule was not a new one, and referred to *Pepperill v. Burrell* (a). But

Per Curiam.—The rule has not yet been applied to pleas in abatement; this rule will therefore be absolute without costs; but in future, in this and all other cases of supposed exception to the rule, the irregularity will be visited with costs.

Rule absolute.

(a) 1 Q. M. & R. 372; 2 Dowl. P. C. 674.

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BOLTON, Assignee of THOROGOOD, an Insolvent Debtor,
v. SHERMAN.

TROVER for ten sets of coach harness, &c., ten horses, &c., &c., of the insolvent. Pleas, first, not guilty; secondly, that the plaintiff, as assignee, was not lawfully possessed of the goods, chattels, and cattle in the declaration mentioned, or any or either of them, as of the proper goods and chattels of the plaintiff as such assignee, in manner and form, &c.; thirdly, as to the conversion of the horses and coach harness in the declaration mentioned, that before the said William Thorogood petitioned for his discharge from imprisonment, to wit, on the 29th November, 1835, the defendant sold and delivered to the said W. Thorogood divers horses and certain coach harness, being the same coach harness in the declaration mentioned, for the sum of 150*l.*, on certain terms then agreed upon between them; that is to say, that the defendant should and might at any time, until the said price of the said horses and coach harness should be fully paid and satis-

Trover by the assignee of A., an insolvent, for ten sets of harness, ten horses, &c. The defendant pleaded that the plaintiff, as assignee, was not lawfully possessed of the goods, &c. as of his own property as assignee; and also a plea stating that before the insolvent petitioned for his discharge, the defendant sold and delivered to him divers horses and harness, being the same as those mentioned in the declaration, for 150*l.*, on the terms that the defendant might

at any time, until payment of the price, take and retain the horses and harness as a pledge and security for such part of the price as should remain unpaid, until payment thereof; that, at the time of the alleged conversion, 22*l.*, part of such price, remained due; and that after the plaintiff became possessed as assignee, the defendant took the said horses and harness into his possession as such pledge and security, &c., which is the conversion in the declaration mentioned. To this plea the plaintiff now assigned, that the action was brought, not for the supposed conversion in the plea mentioned, but for the conversion of ten sets of harness, ten horses, &c., other than and different to those in the plea mentioned, &c.; to which the defendant pleaded not guilty:—*Held*, that the plaintiff was entitled, under the new assignment, to give in evidence a conversion by the defendant of five horses, two of which were, and three were not, the subject of the agreement stated in the plea.

The defendant, the proprietor of a stage-coach, delivered to A., who horsed the coach one stage, five horses, to be used upon the coach. Three of them died, and A. bought three others in their place. After using these five for some months, A. became insolvent, and went to prison, and was subsequently discharged under the Insolvent Act. On the day he went to prison, he sent an order, under which the five horses were delivered to the defendant, who refused to give them up to the assignee. The five were worth 100*l.*, and any two of them were worth 30*l.* In trover by the assignee for the three horses which A. had bought, the defendant set up, in one plea, an agreement under which he claimed to retain the five horses delivered by him to A. as a security for their price, alleging that 22*l.* of the price was still unpaid:—*Held*, in trover by the assignee, that as to the three horses bought by A., there was no evidence to shew that he transferred the property in them to the defendant.

Held, also, that even if the property was transferred, there was sufficient *prima facie* evidence that the transfer was voluntary, within the 7 Geo. 4, c. 57, s. 32.

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fied, have, take, and retain the said horses and coach harness into his possession, as a pledge and security for the payment of the said price thereof, or such part thereof as should remain unpaid, and keep and retain the same as such pledge and security, until the said price, or such part thereof as aforesaid, should be fully paid or satisfied: and that the said price had not, at the time of the conversion in the declaration mentioned, been paid or satisfied; but that a large part thereof, to wit, 22*l.* 1*s.* 3*d.*, remained and still remains due and unsatisfied: and that after the plaintiff, as such assignee as aforesaid, became possessed of the said horses and coach harness as aforesaid, as of his own proper goods, chattels, and cattle as in the declaration mentioned, to wit, on the 1st May, 1836, the defendant took, had, and received the said horses and coach harness into his possession, as such pledge and security for the payment of the said price so then remaining due and unpaid as aforesaid, and kept and detained the same as such pledge and security as aforesaid from thence until the commencement of this suit, as he lawfully might under and by virtue of the said terms and agreement on which the said horses and coach harness were sold by him as aforesaid, which is the conversion in the declaration mentioned, &c.

Replication and new assignment to the last plea, that the plaintiff issued his writ and declared thereupon, not for the supposed conversion in the introductory part of the last plea mentioned, but for that the defendant, on the 10th August, 1835, converted and disposed to his own use divers goods, chattels, and cattle of which the plaintiff, as such assignee as aforesaid, was lawfully possessed as his own proper goods, chattels, and cattle as such assignee, different to and other than the horses and harness in the introductory part of that plea mentioned, to wit, ten sets of coach harness, &c., ten horses, &c. of the value aforesaid, in manner and form, &c., and which griev-

ances above newly assigned are other and different grievances than the said grievances in the last plea mentioned, &c. Plea to the new assignment, not guilty.

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At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after Michaelmas Term, the facts appeared to be as follows:—

The insolvent, Thorogood, who was a coachman employed on the Phoenix Dover Coach, of which the defendant was the proprietor, undertook, in November, 1835, to horse the coach for the stage from Broughton to Canterbury. Five horses and a set of coach harness were at that time taken by one Simpkins, a person in the defendant's employ, by the direction of the defendant's foreman, from the Horse Repository in Goswell-street Road to Canterbury, and ran in the coach through the above stage. Three of them died, and were replaced by others which were purchased by Thorogood. In May, 1835, Thorogood became embarrassed, and on the 27th of that month he went to prison with the intention of taking the benefit of the Insolvent Debtors' Act: he subsequently petitioned the Court for his discharge under the act, and the plaintiff was appointed his assignee. On the 27th or 28th May, Simpkins went to Broughton, by the direction of the defendant's foreman, with a note signed by Thorogood, and addressed to the man who had the care of the horses for him, requiring him to deliver them up to the defendant. The five horses, (consisting of the three purchased by Thorogood, and the remaining two of the original five), and the harness, were accordingly delivered to Simpkins, and were taken possession of by the defendant. These five were worth 100*l.*, and any two of them were worth 30*l.* A demand and refusal of the horses before action brought was proved. On this evidence, it was objected for the defendant, first, that the form of the new assignment precluded the plaintiff from recovering, unless he proved the conversion of *more* than the five horses and the harness which

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were the subject of the agreement stated in the third plea; and secondly, that there was no evidence to shew that the horses belonged to the plaintiff as assignee, having been re-delivered to the defendant while Thorogood retained the property in them. The learned judge expressed his opinion that the third plea could, at all events, apply only to the two horses which remained of those that originally came from the defendant to the insolvent; but he reserved leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the plaintiff, under these pleadings, was not entitled to recover the other three horses: and he stated to the jury that the question for their consideration was, whether the transfer of the horses by Thorogood to the defendant was made voluntarily, and with the intention of taking the benefit of the Insolvent Act; that less evidence was requisite to prove voluntariness in the case of an insolvent than of a bankrupt, and that he thought it was not necessary for the plaintiff to give further evidence on that point than he had given. The jury found a verdict for the plaintiff for 60*l.*, the value of the three horses.

In Hilary Term, *Bompas*, Serjt., moved pursuant to the leave reserved.—The first question is, whether, under the circumstances stated in the pleadings and disclosed in evidence, the plaintiff could now assign the taking of other horses, there having been only one taking and one conversion. It is contended that he cannot, but is concluded by the justification. If he had taken issue on the plea, he might have shewn that the matter pleaded as a justification did not extend to cover all the five horses. The defendant must then have proved that he had a lien on all of them. As in the case where a licence has been pleaded, which is traversed by the replication; it has been held that the defendant is bound to prove a licence as to all the trespasses

proved. *Barnes v. Hunt* (a). The principle of the case of *Oakley v. Davies* (b) applies to the present. There, in trespass for an assault and false imprisonment, the defendant justified the assault and imprisonment under a writ sued out by him as attorney for J. M., against the plaintiff, indorsed for bail for 100*l.*, which was delivered to the sheriff, who by virtue thereof arrested and detained the plaintiff; and it was held, that if the plaintiff, (instead of traversing the plea, as he ought to do if the arrest were irregularly made by the officer, without a sufficient warrant from the sheriff), new assigned that the trespass was upon *another and different occasion* than that stated in the plea, and *after the supposed arrest* therein mentioned; the defendant, on proof of the facts as before stated, was entitled to a verdict. [*Parke, B.*—The plaintiff was bound on that new assignment to prove an arrest on a different occasion from the one justified. Under this new assignment the plaintiff has only to prove that there were horses taken which were not subject to a lien]. If the defendant justifies the taking of the horses mentioned in the declaration, the plaintiff, by not traversing that defence, admits it, and the defendant does not bring witnesses to prove it; whereas, if the pleadings had not admitted it, the defendant might have proved the whole. If, as in *Barnes v. Hunt*, the plaintiff had traversed the justification pleaded, the defendant would have been bound to shew a justification under a lien as to all the horses proved to have been taken. The form of the plea here is substantially the same as in *Oakley v. Davies*. Suppose the defendant had justified the taking of ten horses; then the plaintiff ought to have proved under the new assignment the taking of a greater number of horses, or, at all events, of one more horse than ten, to entitle himself to a verdict. Where one assault only is alleged in a de-

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(a) 11 East, 450.

(b) 16 East, 82.

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claration, and the defendant justifies that assault, and the plaintiff new assigns another and a different assault, he must prove two assaults in order to entitle himself to recover. In 1 Wms.'s Saunders, 299, it is said "the plaintiff cannot new assign unless there have been two assaults &c. at least committed upon him; for the new assignment is an acknowledgment by the plaintiff that the defendant has justified one assault." [Lord *Abinger*, C. B.—You say that the plaintiff could not give evidence under the new assignment of the taking of the five horses which were the subject of the agreement set up in the plea—that the taking of them must be taken to be justified]. The plaintiff cannot give evidence of the conversion of those five horses, the taking of which he has admitted to be justified. If the plaintiff had declared for ten horses sold and delivered to the defendant, and the defendant had pleaded payment, and the plaintiff had new assigned, and had only proved that he had sold the defendant ten horses, the defendant would be entitled to a verdict. [Lord *Abinger*, C. B.—You say he ought to prove one more than ten. Why should he be confined to proving more than *ten* any more than three?] It is the same as if there had been ten assaults, which were admitted to be justified on the record; the plaintiff must prove eleven to entitle himself to recover. If he had taken issue on the plea, the case would have been different. [Parke, B.—Suppose there had been a replication de injuriâ; under that the plaintiff might have proved the taking of horses not justified under the lien; may he not also shew the same under this new assignment? Suppose, in *Barnes v. Hunt*, the plaintiff had new assigned instead of replying de injuriâ; might he not have shewn trespasses committed which were not covered by the licence?] The plaintiff in effect admits that all that is covered by the plea is justified—there was only one act of conversion, and that he admits to be justified, and says, by his new assignment, "I go for another conversion,

not for the conversion in the introductory part of the plea mentioned."

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The Court granted a rule nisi on the second objection taken at the trial, viz., that the re-delivery of the horses to the defendant prevented the property from vesting in the assignee; but on the point argued above, they took time to consider whether they would grant a rule; and on a subsequent day, the rule was refused on that point. In the present term,

Kelly, Godson, and Lee, shewed cause.—The questions are, first, whether there is any evidence to shew that the property in the three horses was transferred from the insolvent to the defendant; and secondly, if there is, whether they were not so delivered as that it was a voluntary transfer, and fraudulent within the meaning of the 7 Geo. 4, c. 57, s. 32. Now, there is no evidence of any bargain or transaction between the insolvent and the defendant, under which the defendant could set up any right to a transfer of any of the horses, or at all events of these three, which are none of those originally delivered to the insolvent, but had been subsequently purchased by him of other persons. But even assuming that there was some evidence that the horses were delivered as a pledge or security for an existing debt, there was clearly a *prima facie* case of voluntariness to go to the jury, which called on the defendant to shew some circumstances to rebut it. It is admitted that the onus of proof is on the assignee, according to the doctrine laid down in *Doe v. Gillett* (a); but he cannot directly prove a negative—that the transaction was *not* voluntary—but can only adduce such circumstances as make out a *prima facie* case of voluntariness. Here the transfer was at the precise period of the insolvent's going to prison, and was a transfer of property of much

(a) 2 C. M. & R. 597.

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greater value than the amount of the debt alleged by the defendant himself to be due to him; and there was no evidence of any demand by the creditor, or of any communication whatever between him and the insolvent.

Bompas, Serjt., and Peacock, contra.—There was sufficient *primâ facie* evidence that the insolvent was indebted to the defendant. The delivery to him of the five horses of itself raised an inference of a debt for their value. The case was opened for the plaintiff at *Nisi Prius* on the ground that the transfer was voluntary, and it was assumed throughout that it was such a transfer as passed the property. If so, the plaintiff never was possessed of the horses as of his own property as assignee. The second plea puts in issue, not only whether they were the property of the plaintiff as assignee, but also whether he had such a property in them as would draw to him a lawful right to the immediate possession. If, therefore, they had been transferred to the defendant by way of a lien or security for a *bonâ fide* debt, the defendant was entitled to a verdict on the second issue. Secondly, there was no evidence of voluntariness in the transaction. The onus is clearly on the assignees to make out that it was voluntary; *primâ facie*, a party has a right to dispose of his effects as he thinks fit. But the jury might naturally infer, from the language of the learned Judge, that the defendant was bound to shew pressure, or something else which would preclude the presumption of voluntariness arising: and the same facts might lead them to different conclusions, according to the statement on whom the onus of proof was. Here there was no evidence under what circumstances the order was transmitted to the defendant; whether in consequence of pressure from him, or otherwise. There might be cases in which it would be impossible to prove the voluntariness of the transaction by direct evidence, but this is not one of them; the plaintiff might have explained it

by calling the defendant's foreman, out of whose hands the order of the insolvent came. *Exch. of Pleas, 1837.*

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LORD ABINGER, C. B.—I think this rule ought to be discharged; and I cannot avoid remarking that the whole controversy in this case appears to have arisen from what was certainly never intended to produce such a consequence, viz., the new forms of pleading. If this case had been tried under the old system, on the general issue only, it would have taken some such course as this:—The plaintiff brings his action of trover for five horses: the defendant contends that he has a lien upon them as a security for a debt, which is admitted between the parties to amount to the sum of 22*l.* and a fraction only. To this the plaintiff would answer, that two of the horses might be given for such security, but that the other three certainly could not, and therefore those are the three he goes for; and the case would prove that. But the new forms of pleadings create the difficulty: you cannot take advantage of an admission in one plea to assist another: if however the parties, in the course of the cause, take a particular fact for granted that goes to support one issue, that fact may be taken for granted for all purposes, and as to the whole case (*a*). Now here the plaintiff says, “I am not going for any of the horses which are the subject of the alleged agreement, but for three different horses.” Then the question is, on the first and second pleas, whether there is any evidence of a delivery of those three horses by way of pledge for a debt, or by way of lien. Now, there is no suggestion of any lien except as to the original five horses, nor of any debt except that stated on the record, and admitted between the parties, viz. 22*l.*; and my opinion is, that there was no evidence at all from which the jury could have been directed to infer any intention on the part of the insolvent to change the property in the three horses in question. If

(*a*) See *Stracy v. Blake*, 1 M. & W. 168.

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any debt to a larger amount than their value had been proved, the question would arise whether the transfer was intended to satisfy that debt, and if so, whether there was sufficient evidence that it was a voluntary transfer. But there is no evidence whatever of any transaction except that referred to in the third plea; and it is plain, although the insolvent might have meant to send the two horses to the defendant under the original contract—they being abundantly sufficient to satisfy any pledge which could be demanded under that contract—he could not send the other three with the same intention: I think the legitimate inference from the evidence is, that as to three he did not intend any change of property at all; and on that ground, therefore, there ought to be no new trial. But I am not prepared to say, as to the other point, that this case is absolutely denuded of all evidence to shew the voluntariness of the transaction, as to the three horses. Under what pretence could the defendant ask the insolvent to send him five horses, as a security on a contract under which a sum was due which was less than the value of two of them? No doubt, it is incumbent on the assignee to give evidence of the voluntariness; but I think he did, in the present case, give sufficient evidence to go to a jury. This is the case of a delivery of three horses by a man just gone to prison, and intending to petition the Insolvent Debtors' Court for his discharge; he could not suppose that but for such delivery the creditor was in any danger; it did not appear that there was any demand on him; and these three were horses which the defendant had clearly no right to demand. I think all these circumstances did make out a sufficient *prima facie* case that the transaction was a voluntary one.

PARKE, B.—I am of the same opinion, that the rule ought to be discharged; although in the course of the argument I have had some doubts whether, on the first

ground stated by my Lord, if the case had depended upon that, there ought not to have been a new trial; I am not quite satisfied that there was not some little evidence of a transfer by the insolvent to the defendant, either out and out, or by way of lien, which, if it were so, would have disposed of the case, on one or other of the two first pleas, in favour of the defendant. The case, however, went to the jury on a different ground; viz., whether, assuming this to have been a transfer of the property in the three horses by the insolvent to the defendant, it was or was not a *voluntary* transfer. I find nothing to induce me to believe that the summing up of the learned Judge was not correct. He did not say that the onus of proof was not on the plaintiff, but that no more evidence was necessary to be given than he had given: and in that I concur with him. There is not now any question on the law; it is admitted that the assignee is bound, in order to recover, to bring himself within the 32nd section of the Insolvent Act; otherwise, as the horses were delivered before his title accrued, he can have no claim to the possession of them: and it is equally clear that the burthen of proof is upon him. The only question is, whether there was *primâ facie* evidence that the transfer was voluntary. The assignee might certainly have given *more* evidence; he might have called the defendant's foreman to shew the circumstances under which the order came to his hands; but I think he was not bound to do so; he proved circumstances sufficient to induce the jury to infer that the transfer originated in the act of the insolvent, and was not induced by pressure or demand of the creditor. The transfer *must* have been for the purpose of satisfying 22*l.* only, which was admitted on all hands to be the whole sum due to the defendant; then, would five horses worth 100*l.* be transferred to satisfy so small a debt, and is it not most improbable that the creditor would ask for so large a transfer to satisfy so small an amount? It is made, too, on the

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very day of the insolvent's going to prison, when no advantage could possibly accrue to him by the transfer. These circumstances were sufficient to constitute a *prima facie* case of voluntariness on the part of the assignee. That the burthen of proof is upon him I have not the least doubt, but the learned Judge did not lay it down otherwise; and I find no fault with his observation that less cogent proof was necessary than in a case of bankruptcy; because, the transfer being made at the period of the commencement of the imprisonment, it was not necessary that the party should have made it with the view and intention of taking the benefit of the Insolvent Act, but only that it should be shewn to be voluntary.

ALDERSON, B.—I am of the same opinion. The only evidence of the transfer is the delivery, by the insolvent's order, of five horses to the defendant. The question is, does it raise any reasonable presumption that it was a transfer of the property, or such as to give the defendant a lien on the five horses. Now, referring to the other circumstances in the case, we find that the residue of the debt was only 22*l.*, that the five horses were worth 100*l.* and any two of them worth 30*l.*, and that two of the five only were any of the same horses as were originally delivered by the defendant to the insolvent. From these facts I should infer, that if any horses were to be re-delivered in pursuance of the original bargain, it might be reasonable that the two remaining of the original five only would be delivered, and that the delivery of the other three would have no reference to such bargain, they being three with which the defendant had nothing whatever to do. There seems, therefore, to be no reasonable evidence of any transfer of property as to the three, but rather that they were delivered to be held for the use of the insolvent till he came out of prison again, or on some such understanding. Then, as to the second point, I think there was abundant evidence on which the jury might reasonably con-

clude, that the transfer was voluntary as regarded the three horses.

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GURNEY, B., concurred.

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Rule discharged.

In the Matter of the Estate and Effects of MOSES ROBINSON, deceased.

THE ATTORNEY-GENERAL moved to make a rule absolute calling upon the representatives of Moses Robinson to account, and that it might form part of the rule, that if upon the delivery of the account of the intestate's property there should be found to be any duties payable to his Majesty, I. A., & S., his wife (which said S. was the administratrix of the intestate), should pay the costs of the Crown in this matter, such costs to be taxed in the usual manner.—Before the passing of the 42 Geo. 3, c. 99, s. 2, there were two modes for the recovery by the Crown of duties on legacies; the one by filing an information in this Court in the name of the Attorney-General for the legacy duties, the other by filing an information in equity for the amount. By that statute a summary mode of proceeding was given. It was thereby enacted, that in every case in which any executor or administrator should not have paid the duties payable in respect of any legacies or any personal estate, &c. of any person dying intestate pursuant to 36 Geo. 3, c. 52, or any other act or acts relating to duties on legacies or shares of personal estate, within proper and reasonable time, it should be lawful for his Majesty's Court of Exchequer, on application made on behalf of the Commissioners of Stamps, on such affidavit or affidavits as to the Court might appear to be sufficient, to grant a rule requiring such executor or administrator to shew cause why he should not deliver to the commissioners an account upon oath of all the legacies,

When, on a rule nisi, calling upon executors to account for and pay over legacy duties, the executor does not appear to shew cause, and the rule is therefore made absolute, the Court ordered that in future, in such cases, it should form part of the rule, that if, upon the delivery of the accounts, there should be found to be any duties payable to his Majesty, that the executor or administrator should pay the costs of the Crown, to be taxed in the usual manner.

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or of the personal property respectively paid or to be paid or administered by him, and why the duties on any such legacies, or any shares or residue of any such personal estate, had not been paid or should not be forthwith paid. That act is silent as to costs, but by the 53 Geo. 3, c. 108, s. 3, it is enacted, that in all actions, bills, complaints, informations, and proceedings had, prosecuted, entered, or filed, or thereafter to be had, &c., in the name of his Majesty, &c., or in the name of any person on his behalf, for the recovery of any duties, debts, or penalties granted or payable by or under any act or acts of Parliament relating to the duties under the management of the Commissioners of Stamps, it should be lawful for his Majesty, &c., "to have and recover such duties, debts, and penalties, with full costs of suit, and all charges attending the same." It appears that under this act the practice had been for the Comptroller of the Legacy Duties to write five letters successively to the representatives of the deceased. If the executor did not render the account then, an application to this Court was made for a rule nisi calling on the executor to account, and when the executor did not appear, the rule was made absolute that the representative should, within eight days after service, deliver the account, and that he should, within the same time, pay the duty chargeable on legacies, the property of the testator, and within the same time pay the costs of the Crown. A doubt was expressed by *Parke, B.*, in a recent case in this Court, whether it was incumbent on the Court to award costs; and in a subsequent case at Gray's Inn Hall, Lord *Abinger, C. B.*, said, that it was only in case it should turn out that duties were due to the Crown, that costs should be paid, and in that case his Lordship directed the order to be drawn up with the following addition:—"The Court does hereby reserve the consideration of the question of costs until after the said R. C. (the personal representative) shall have rendered the account hereinbefore directed." This was felt to be an in-

convenience, as it would be necessary to make a fresh application for the costs, which would put the Crown and the party to an additional expence, and this application was now made that the Court should direct that the costs should be paid if it should turn out that duties were payable to the Crown.

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The Attorney-General contended, that where it turns out that there are duties recoverable by the Crown, the act leaves no discretion in the Court as to the costs; and cited *Rex v. Amery* (a). Undoubtedly costs ought to be given only where it shall turn out that there are duties payable. [*Parke, B.*—The question is, whether we can grant this in the first instance conditionally, or whether we must wait for the event. *Lord Abinger, C. B.*—Suppose the executor renders an account to the commissioners, and a difference arises as to the legal effect of that account; it would then be necessary to file an information either for the duties or for the penalties, which would bring the question to be tried; then, if that were found for the Crown, the Crown would, no doubt, be entitled to the costs. *Parke, B.*—If it appears upon the face of the account that something is due, I apprehend there is no alternative, but the personal representative is bound to pay the costs. *Alderson, B.*—The difficulty is, that you are asking the Court to award costs on the decision of the commissioners, not on the decision of the Court, who may decide whether the executor has rendered a proper account, and whether there is anything due upon it. If there is any dispute, ought not the Court to decide that before they award the costs?] It is only where the executor and commissioners agree, that the order is final, because, if there is any difference between them, it becomes necessary again to apply to the Court in some shape. It is submitted that there can be no objection,

(a) 1 Anst. 178.

Exch. of Pleas, in those cases where they do agree, to order that the costs shall be paid.
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THE COURT took time to consider as to what should be the course to be pursued in future ; and on a subsequent day,

LORD ABINGER, C. B., said,—This was a rule moved for by the *Attorney-General* with reference to the legacy duty. He desired that the rule might be made absolute, and for the purpose of saving the expence of a further application to the Court, that an addition should be made to the rule, for the Crown to be entitled to costs, in case it should appear, upon the statement made by the defendant, that there were legacy duties due from him which ought to have been paid. We think there is no objection to making the rule in that form ; it will save the expence of any further application ; and therefore let the rule be made absolute upon the defendant, and that he shall pay such costs as shall be taxed by the Master, in case it shall appear upon his statement that legacy duties were due from him which he refused to pay. That is in the terms prayed for by the *Attorney-General*.

Rule absolute.

ROBINSON v. CRESSWELL.

Semble, that a rule nisi for a supersedeas, on the ground that the defendant had been in custody a month after he was supersedeable by reason of the plaintiff's not having declared in time, is no stay of proceedings, and the plaintiff may proceed, after service of such rule, to charge the defendant in execution.

UDALL had obtained a rule calling upon the plaintiff to shew cause why the habeas corpus ad satisfaciendum issued in this cause should not be set aside, and why the defendant should not be discharged out of the custody of the warden of the Fleet, pursuant to the Rule of H. T. 2 Will. 4, s. 88, on the ground that he had been in custody for a calendar month after he had become supersedeable by rea-

time, is no stay of proceedings, and the plaintiff may proceed, after service of such rule, to charge the defendant in execution.

son of the plaintiff not having declared in the action in due time. On the day after the rule was obtained and served, the defendant was charged in execution at the suit of the plaintiff, *Parke*, B. holding the previous rule to be no stay of proceedings.

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Mansel shewed cause, and urged that the custody being changed by the charging in execution, the defendant could not now be discharged, or at all events only as to the mesne process. He referred to *Rose v. Christfield* (a), and *Line v. Lowe* (b).

Udall, contra.—The supersedeas on the mesne process has relation back to the time when the defendant was supersedeable, so as to avoid the charging in execution. In *Pierson v. Goodwin* (c), where a defendant was supersedeable for want of judgment being entered up in due time, but was not actually discharged, it was held that he could not be detained in an action on the judgment; for that his actual discharge related back to the time when he had a right to be discharged.

LORD ABINGER, C. B.—In that case the party had not been charged in execution. I think we cannot entertain the application to discharge the defendant altogether; he was regularly charged in execution, because the rule was no stay of proceedings.

Udall, however, stating that he could refer the Court to authorities to shew that the charging in execution, under the circumstances, was irregular, the case stood over for that purpose, until *Parke*, B., should be in Court; and on a subsequent day,

(a) 1 T. R. 591.

(b) 7 East, 330.

(c) 1 Bos. & P. 361.

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Mansel appearing to shew cause against the rule, but no counsel being present on the other side, the rule was

Discharged with costs.

ALDRIDGE v. BULLER.

An outlaw cannot appear in court for any other purpose than to reverse his outlawry. Therefore, he cannot sue out a habeas corpus ad satisfaciendum, in order to charge a plaintiff in execution, against whom he has obtained judgment as in case of nonsuit; although his outlawry was at the suit of a different plaintiff.

The Court refused, however, after the lapse of three terms, to set aside the judgment on the same ground.

PRICE moved for a rule to set aside the judgment as in case of a nonsuit signed in this cause, on the ground that the defendant was an outlaw. The outlawry (which was at the suit of a different plaintiff) took place in May, 1836; the judgment was signed in the ensuing Trinity Term. In March last, the defendant sued out a habeas corpus, to charge the plaintiff in execution for the costs. *Price* contended that the defendant had no right to come to the Court for any purpose. [Lord *Abinger*, C. B.—Why did you not apply sooner?] It did not become necessary to do so until the defendant took a further step, by suing out the habeas corpus. [*Parke*, B.—May not the defendant protect himself from a wrongful action, though he is an outlaw? If the cause had gone on to trial, and no cause of action had been shewn, the plaintiff must have been nonsuited; and this judgment is in place of that].

THE COURT, however, held that the application was too late; and on that ground refused the rule.

Price also (on the 29th April) moved for and obtained a rule nisi to set aside the habeas corpus; against which, on a subsequent day,

J. W. Smith shewed cause, and contended that this application, as well as the former, was too late. The plaintiff might have come to the Court at any time between May 1836 and the present Term, to set aside the

judgment on this same objection; or on any earlier day in April, to set aside the habeas corpus.—The Court, however, overruling this objection, he urged in the next place, that the rule which prohibited an outlaw from taking any step in a cause applied only to plaintiffs and not to defendants. [*Parke*, B.—The defendant is here acting as a quasi plaintiff. Lord *Abinger*, C. B.—Suppose, instead of suing out the habeas corpus, he had sued on the judgment.] In that case the plaintiff must have pleaded the outlawry in abatement; Vin. Abr. Utlawrie, C.; *Clark v. Scroggs* (a); and would have had four days only for that purpose. At all events he has his remedy by audita querela, and ought to be put to that; *Symons v. Blake* (b). The Court will not be disposed to exercise its equitable interference in favour of an objection which has always been deemed odious to the law. [*Parke*, B.—The form of an audita querela is “auditâ querelâ defendentis;”—it is not a remedy which a plaintiff can resort to.] If this rule be made absolute, the defendant's attorney will lose his lien on the costs of the action.

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Price, in support of the rule, was stopped by the Court.

LORD ABINGER, C. B.—The principle is clearly laid down in the authorities, that an outlaw cannot appear in Court for any purpose but to reverse his outlawry: that is a rule so long settled, that we ought not now for the first time to create exceptions to it. Here the habeas corpus is nothing more than a mode by which the defendant seeks to pursue a remedy on his judgment; he is making use of the process of the Court for his own benefit. The rule must be absolute.

(a) 1 Lutw. 315.

(b) 2 C. M. & R. 416.

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PARKE, B.—The only doubt I had was, whether the application was in time; but as it was made before the defendant had taken any step on the habeas, I think it is sufficient.

BOLLAND, B., concurred.

ALDERSON, B.—It has been held over and over again that an outlaw cannot come into a court of justice for his own benefit. For what else does the defendant come here?

Rule absolute.

EDWARDS v. JONES.

Quære, whether a defendant, who has been arrested and imprisoned on mesne process, and is discharged in consequence of a defect in the affidavit to hold to bail, can be said to be "arrested and held to special bail," within the meaning of the 43 Geo. 3, c. 46, s. 3.

In an action by the indorsee against the acceptor of a promissory note for 100*l.*, he pleaded that, by agreement between him and the drawer, the note

was not to be enforced except on certain terms, which the drawer had not complied with; and that the plaintiff had received the note without consideration. The plaintiff entered a *nolle prosequi* as to all the amount except 49*l.*, for which he had given value to the drawer, and had a verdict for that sum. It did not appear that the plaintiff was cognizant of the agreement between the defendant and the drawer:—*Held*, that the defendant, who had been arrested for the whole amount of the note, was not entitled to costs under the 43 Geo. 3, c. 46, s. 3.

THOMAS had obtained a rule to shew cause why the Master should not tax the defendant his costs under the 43 Geo. 3, c. 46, s. 3. The declaration was by the plaintiff as indorsee, against the defendant as drawer, of a promissory note for 100*l.*, and the defendant was arrested for that amount. He pleaded, that before the making of the note one Evan Jones sold to him the defendant an undivided moiety of a sloop called the *Mary Ann* of Aberayron, for the sum of 100*l.*, and in consideration that the said Evan Jones, by writing under his hand, then agreed with the defendant that the said sum of 100*l.* should be payable when and as the said sloop might earn the same by carrying goods for the said Evan Jones, and not before; and that the said E. Jones would constantly employ the said sloop in carrying goods for him at reasonable freight, until the said sum of 100*l.* was liquidated and discharged

by the amount of freight to be due to the defendant for such carriage; and that in the event of the defendant refusing or neglecting to carry the goods of the said E. Jones in the said sloop at reasonable freight, in liquidation and discharge of the said sum of 100*l.*, and not otherwise, the said promissory note should be enforced; and on the considerations aforesaid, and upon no other consideration whatever, the defendant made the said promissory note. The plea then averred that the defendant was always ready and willing to carry the goods of Evan Jones pursuant to the agreement, but that he refused to employ the sloop for that purpose, and so the consideration upon which the note was made and delivered by the defendant to Evan Jones had wholly failed; and that Evan Jones indorsed the note to the plaintiff without value or consideration. The plaintiff replied, as to 49*l.* 2*s.* 1*d.*, parcel of the sum of 100*l.* in the declaration mentioned, (the amount for which he had actually given value on the transfer of the note to him), that Evan Jones indorsed the note to him, and that he took and held it for a good and sufficient consideration, and for value as to that amount: and entered a *nolle prosequi* as to the residue of the 100*l.*: and on the trial he had a verdict accordingly for 49*l.* 2*s.* 1*d.* The defendant, after his arrest, remained in prison for a short time, until, on the discovery of a formal defect in the affidavit to hold to bail, he was discharged out of custody under a judge's order, on entering a common appearance.—The affidavit in support of the rule set out an agreement between the defendant and Evan Jones, to the effect stated in the plea.

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E. V. Williams shewed cause.—First, the defendant in this case has not been “arrested and held to special bail” within the terms of the statute, and therefore is not entitled to the relief given by it. In *Bates v. Pilling* (a), this Court expressly decided that to entitle a defendant to costs

(a) 2 C. & M. 374.

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under this statute, it is essential that there should be both an arrest and a holding to bail. In that case the defendant put in special bail, but had not been actually arrested, the writ not having been executed in consequence of the defendant's attorney undertaking that a bail-bond should be given; that case is, therefore, the converse of the present; and *Bayley*, B., says—"The words are not 'where the defendant shall be arrested' alone, or 'held to special bail' alone, nor are the words 'arrested' and 'held to special bail' synonymous, so as to make one of them useless and nugatory; but they mean different things, and are distinct proceedings, in which different parties act." And *Vaughan*, J., after referring, by way of contrast, to the introductory part of the first section, in which the words are "that no person shall be arrested or held to special bail," &c. says expressly, "It has been asked, if the putting in bail will not do without an arrest—will an arrest without putting in bail? To which I answer—No; both must concur." In *Amor v. Blofield* (a), the defendant was not arrested, but in consequence of a defect in the affidavit to hold to bail, was allowed to file common bail; and there also it was held that he was not within the terms of the statute. In *Wilson v. Broughton* (b), *Parke*, B., undoubtedly expressed some doubt on the point, but it was not necessary to decide it. [Lord *Abinger*, C. B.—Where a party voluntarily gives special bail, he can in no sense be said to be arrested; but when he is arrested he is taken into custody only *until* he gives special bail; so that in one sense he is *held* to special bail. If the terms can be considered synonymous, there is no necessity to read it *or* instead of *and*]. If the proposition laid down in *Bates v. Pilling*, that both the things must concur, be true of one branch of the alternative, it must be true also of the other; it is impossible, therefore, to hold this defendant entitled to the benefit of the statute without overruling that case.

(a) 9 Bing. 91; 2 M. & Scott, 156.

(b) 2 Dowl. P. C. 631.

[Lord *Abinger*, C. B.—It would have been sufficient for the decision in that case to say that an arrest was essential.

Parke, B.—Does not the being actually arrested, and so brought under an obligation of putting in special bail, satisfy all that the statute intended? If the defendant accepts his release from arrest on the terms of putting in special bail, he himself waives the benefit of the statute.

Alderson, B.—If the holding to special bail were the necessary consequence of the arrest, it might be said that the one involved the other; but it is clear that is not so]. There appears to be a mode by which a sensible construction may be given to the statute as it stands, viz. by holding that the term “holding to special bail,” means holding the defendant in custody until he is discharged from the action by due course of law, or until he gives special bail. That construction avoids all difficulty, and leaves the case of *Bates v. Pilling* untouched. It is clear that the holding to special bail is cumulative to the arrest, and presupposes an arrest already made. *Special* bail is put in contradistinction to *common* bail; here the defendant gets out of custody on filing common bail.

Secondly, the plaintiff had reasonable and probable cause to arrest for the whole amount of the note. It does not appear that he knew it was an accommodation note between the original parties; and if not, he would have a right, as indorsee, to sue for the full amount, though he gave value for a part only. [*Parke*, B.—It is very doubtful whether the defence pleaded was any defence at all].

Thomas, *contra*.—The preamble of the statute, which states it to be “for the more effectual prevention of frivolous and vexatious arrests, and for the relief of persons imprisoned on mesne process,” shews that it was the intention of the legislature to extend its benefit to all cases where the party is actually arrested and lies in prison, there being no probable cause for the arrest to the

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amount for which the writ issued. Suppose the defendant, being unable to procure bail in consequence of the excessive amount, lay in prison till the time of the trial, would he not be entitled to the benefit of the Act? Wherever, therefore, there is an actual arrest, and such a detention as puts the party under the obligation of finding bail for the debt, the statute ought to apply.

He urged also that enough appeared to shew that the plaintiff was cognizant of the nature of the original transaction, and that the arrest was malicious.

LORD ABINGER, C. B.—The rule must be discharged. There is no evidence that the plaintiff knew that this was an accommodation note; if he had, and then, without having given consideration, had arrested the defendant for the whole amount, the question on the statute would have arisen, and we must have put a construction upon it. But if, under the circumstances of this case, the plaintiff had not a reasonable and probable cause for suing for the whole amount of the note, in what a situation would every banker in London be who had a lien for advances on bills of exchange of his customers in his hands? They would be very unwise indeed to bring actions for less than the whole amount. If there was any malice, as is suggested, our refusing this rule will not prevent the defendant from bringing an action for a malicious arrest.

PARKE, B.—We are not called upon to give our opinion on the point of law, inasmuch as upon the facts there appears no want of reasonable and probable cause. The plaintiff was a holder of the bill for value, though not to its full amount. *Primâ facie*, 100*l.* was due upon it from the acceptor, and the plaintiff might sue him for the whole amount, because the title of an indorsee is the title of all the prior parties to the note. And if we take the agreement to have been as stated in the plea, it is at least ex-

tremely doubtful whether it was a legal one, being an agreement to substitute a different mode of payment from that provided by the note itself. Probably the plaintiff has used more caution than was necessary in contenting himself with 49*l.*, and he may possibly even have exposed himself to the risk of proceedings on the part of the drawer.

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BOLLAND and ALDERSON, Bs., concurred.

Rule discharged.

YEOMANS v. LEGH.

CASE against the defendant for negligent driving by his servant. Plea—Not guilty. At the trial before *Bolland*, B., at the London Sittings after last Michaelmas Term, the plaintiff having proved his case, the servant who drove the carriage at the time the injury was done, was tendered as a witness on the part of the defendant. The learned Judge, however, was of opinion that he ought to be released before he could be examined, and rejected the evidence. The plaintiff having recovered a verdict, *Hindmarch*, in Hilary Term last, obtained a rule to shew cause why this verdict should not be set aside, and a new trial granted, on the ground that the witness was competent, and ought to have been received. Against this rule

In an action on the case for negligence in driving by the defendant's servant:—*Held*, that since the 3 & 4 Will. 4, c. 42, the servant is a competent witness for the defendant without a release, his name being indorsed on the record.

Petersdorff now shewed cause.—The object of the legislature in passing the 3 & 4 Will. 4, c. 12, s. 26, was to obviate an existing imperfection in the law—to render witnesses competent whose testimony was previously wholly inadmissible. The preamble clearly indicates, that the enactment was made to render the rejection of witnesses on the ground of interest less frequent. Now, before this statute, a party in the situation of the rejected witness might have been examined on obtaining a release.

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To extend the act to such a person would be applying its provisions to a case not within the mischiefs then existing or requiring removal. Every useful end would be obtained by applying it to persons claiming under some right of common, or customary or other local claim, where a release would not operate in producing competency. It has been decided in several recent cases that a release is still necessary. In *Mitchell v. Hunt* (a), which was an action on the case for injury to the plaintiff's wall, by improperly digging a cellar near it, it was held that the workman who dug it was not made a competent witness for the defendant by this statute, and that he must be released by the defendant before he could be examined. *Harrington v. Coswell* (b), *Harding v. Cobley* (c), *Hodson v. Marshall* (d), and *Burgess v. Cuthill* (e), are decisions to the same effect. It must be admitted, that in *Faith v. M'Intyre* (f), the decision was contrary to that in *Burgess v. Cuthill*, and *Parke, B.*, there held, that in an action on a bill of exchange by the indorsee against the acceptor, the drawer was a competent witness for the defendant under this statute, his name having been indorsed on the postea. In the case of the *Bailiffs of Godmanchester v. Phillips* (g), it was held that the incompetency of a witness interested in the event of the suit could not be removed by the indorsement of his name on the record under the statute. [*Parke, B.*—The Court there were of opinion that the incompetency of a witness interested as a member of a corporation was not removed by a release of such interest by him to the corporation, because he was in effect released by himself. How would the result of the verdict in this case affect the witness? it would merely ascertain the amount of the damages, not establish his liability.] The

(a) 6 Car. & P. 351.

(b) 6 Car. & P. 352.

(c) 6 Car. & P. 664.

(d) 7 Car. & P. 16.

(e) 6 Car. & P. 282; 1 Mo. & Rob. 315.

(f) 7 Car. & P. 44.

(g) 6 Nev. & Man. 211.

amount of damages is not the legal test. The proper rule is legal right or liability, or the adoption of the criterion of the witness proving or disproving some essential fact. To make damages the test would be to confound legal rights and responsibilities with the results of judicial inquiries, depending on many accidents and contingencies.

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Hindmarch, contrà, was stopped by the Court.

PARKE, B.—I have no doubt in this case that the rule ought to be made absolute, as I think the witness was competent without a release. The effect of the clause in the statute is to make the witness competent, where the only interest is that the verdict may be used for or against the witness. In this case there is no interest, except that the verdict might be used against him in an action by his master, to shew the amount of the damages recovered. I am clearly of opinion that the effect of the Act is to take away the objection to the admissibility of the witness in cases of this sort, and that its operation is not restricted to cases in which it was before impossible to make the witness competent by a release. The point was similarly decided by the Court of Common Pleas a few days ago, in a case of *Bowman v. Willis*.

ALDERSON, B.—I am of the same opinion. The 26th & 27th sections taken together, make the witness competent. I have always understood the effect of the Act to be, to supersede the necessity and save the expense of a release.

BOLLAND, B.—I perfectly agree with the rest of the Court. In a case before the Court of Common Pleas, two days ago, they decided the same point.

Rule absolute.

See *Pickles v. Hollings*, 1 Moo. & Rob. 468; and *Creevey v. Bowman*, ib. 496, accord.

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BELBIN *v.* BUTT and Others.

In an action of debt, where there is no plea of payment, the defendant cannot give evidence of payment in reduction of damages.

DEBT for goods sold, and on an account stated. Plea, *nunquam indebitatus*.

At the trial before the under-sheriff of Hants, the plaintiff put in an admission of the sale and delivery of a fly carriage in October, 1835, which stated also that the defendant had paid the plaintiff first 2*l.*, and afterwards 30*s.* on account. In answer to this case, the defendants offered to give in evidence a promissory note dated in the month of February, 1836, given for the amount of the residue of the debt, payable twelve months after date. This was objected to as not being receivable in evidence, there being no plea of payment on the record. The under-sheriff, however, overruled the objection, telling the jury that the only question was whether they thought the note was given in payment for the carriage. The jury having found a verdict for the defendants,

Addison, on a former day in this Term, obtained a rule to shew cause why there should not be a new trial, unless the defendants would consent to a verdict being entered for the plaintiff with nominal damages.

Robinson shewed cause, and contended that the note was receivable in evidence upon these pleadings in reduction of damages, though not as payment.

PARKE, B.—How can you give a note in evidence in reduction of damages in an action of debt? It was held in *Shirley v. Jacobs* (a), that when in an action of assumpsit on a bill of exchange, the defendant pleaded only that he did not accept the bill, payments might be given in

(a) 2 Bing. N. C. 88; 2 Scott, 157.

evidence in reduction of damages; but how can you do that in an action of debt, where there is no inquiry of damages? There must be a new trial, the defendants having leave to amend, unless they will consent to a nominal verdict being entered for the plaintiff.

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Rule absolute accordingly.

DOE d. MORGAN v. ROE.

ON a former day in this Term, *Erle* had obtained a rule to set aside a judgment against the casual ejector for irregularity, no appearance having been entered.

It is not necessary in this Court to enter an appearance for the casual ejector previously to signing judgment by default in ejectment, and the costs of doing so will not be allowed.

Sir *W. W. Follett* now shewed cause.—There is no necessity for entering an appearance, and no authority that it is required by the practice of this Court. In *Tidd's Practice*, 9th ed., p. 1224, in speaking of signing judgment by default against the casual ejector, it is said, “previously to which common bail must be filed for the casual ejector in the King’s Bench by *bill*,” and two rules in the reign of Charles the Second are referred to; but it is added, “though it does not seem necessary to enter an appearance for him by *original* in that Court or in the Court of Common Pleas.” There is no such rule in this Court, and without such a rule it cannot be requisite. The statute 12 Geo. 1, c. 29, does not apply to ejectments. [*Parke, B.*—In other actions you cannot enter an appearance for the opposite party without an affidavit that he has been served with process. It would be difficult to make an affidavit that the casual ejector had been served].

Erle, contra.—According to the books of practice, it is clear, that though there may be a different practice in the different Courts, it is necessary to enter an appearance in

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the Court of King's Bench, unless the proceedings be by original; and the practice of this Court is analogous to proceedings by bill.

PARKE, B.—It has been the practice, since the Uniformity of Process Act, to consider the proceedings in other actions as analogous to proceedings by original; but the action of ejectment is still a proceeding by bill. The officers are not aware of any rule upon the subject in this Court; but they say it is not usual here to enter an appearance, and judgment has been signed over and over again without it. But as it is sworn that there is a good defence upon the merits, the defendant is entitled to have the rule made absolute on payment of costs. In future it must be understood that no appearance need be entered, and that the costs of entering it will not be allowed.

The rest of the Court concurred.

Rule absolute.



REA v. SHEWARD and Another.

If A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building, for the purpose of removing and depositing the goods there for A.'s use.

TRESPASS for breaking and entering a building and close of the plaintiff, and removing certain goods from the building, and depositing them upon the close. Pleas,—first, not guilty: secondly, that the building and close in the declaration mentioned were not the building and close of the plaintiff: thirdly, that the close was the soil and freehold of the Dean and Chapter of Worcester: fourthly, that it was the soil and freehold of one Walker: fifthly, that R. C. was seised in fee of the building, and being so seised, demised it to the defendants, who thereupon entered, &c.; and because the said goods in the declaration mentioned were encumbering the said building, the defendants removed them to a small and con-

venient distance, to wit, into the said close of the plaintiff adjoining thereto, and there left them for the use of the plaintiff, the said close of the plaintiff being a convenient place for depositing the same, &c. The plaintiff took issue on the four first pleas, and replied to the fifth, that R. C. was not seised in fee; on which also issue was joined. At the trial before *Parke*, B., at the last Worcester assizes, the jury found a verdict for the the plaintiff on the four first issues, and for the defendant on the fifth. In the present Term,

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Godson moved to enter up judgment for the plaintiff non obstante veredicto, on the fifth plea.—The verdict on not guilty has established that the defendants were guilty of a trespass both to the building and the close. The question therefore is, whether they could lawfully commit a trespass to the plaintiff's land for the purpose of placing upon it the plaintiff's own goods, having removed them out of a building in which, as it must now be admitted, he had wrongfully placed them. In *Houghton v. Butler* (a), where, in trespass for pulling down and carrying away a gate, the defendant pleaded a right of way, and that the gate being wrongfully erected across the way, he took it down and deposited it in a convenient place for the plaintiff's use, to which the plaintiff replied a subsequent conversion by the defendant to his own use; it was held, that proof that the defendant put the gate on his own premises, whence the plaintiff might have taken it if he pleased, would not sustain the replication. This case, however, differs from that; here the depositing of the goods upon the close has been found to be a distinct *trespass*.

Cur. adv. vult.

(a) 4 T. R. 364.

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On a subsequent day, PARKE, B., delivered judgment. —This was a case which stood over for our judgment, on a motion made to enter up judgment non obstante veredicto. It was contended by Mr. *Godson*, that the law did not allow a person to enter into a plaintiff's own close, even for the purpose of depositing there the plaintiff's own goods, which he had wrongfully placed on the premises of the defendant. When the case was moved, it occurred to me that there was an authority in *Viner's Abridgment* which would dispose of it. I have since found it; it is in title *Trespass*, 516, pl. 17, (I, *a*), and also in *Roll. Abr. Trespass*, I, pl. 17, (p. 566), where it is said, that "if a man comes into my close with an iron bar and sledge, and there breaks my stones, and after departs and leaves the sledge and bar in my close, in an action of trespass for taking and carrying of them away, I may justify the taking of them and putting them in the close of the plaintiff himself next adjoining, especially giving notice of it to the plaintiff, (as it was pleaded), inasmuch as they were brought into my close of his own tort; and in such case of tort I am not bound to carry them to the pound, but may well remove the wrong done to myself by them, by tort of the plaintiff. P. 11 Car. B. R., between *Cole* and *Maundy*, adjudged upon a demurrer." So also, if a man finds cattle trespassing on his land, he may chase them out, and is not bound to distrain them damage feasant: *Tyrringham's Case* (*a*). There must therefore be no rule.

Rule refused.

(a) 4 Rep. 38, b.

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LEACH, Esq. v. THOMAS.

ASSUMPSIT.—The declaration stated that theretofore, to wit, on the 28th May, 1832, the defendant being about to quit, at Michaelmas then next, a certain farm which he then held of the plaintiff, by a certain agreement then made between the plaintiff and the defendant, the plaintiff undertook to see the defendant paid by the incoming tenant of the said farm, for dressing the fallow, five shillings an acre for the first ploughing, and three shillings an acre for every other ploughing, and after a certain rate, to wit, two shillings an acre, for dragging the same; and it was thereby also agreed that the defendant should be paid for the grass seeds sown in the ground of the said farm that year, and one shilling a load for dung when driven on the land; and that if the incoming tenant should wish to purchase the clover-hay, or any meadow-hay, each person should fix on a person to value the same; and if the persons so fixed on should not agree on the value, a third person should be called in, who should finally fix the value of the same; and that the incoming tenant should purchase the corn at a fair valuation. And the said agreement being so made as aforesaid, a treaty was thereupon afterwards, to wit, on &c., entered into between the plaintiff and the defendant, for the retaking of the said farm by the defendant of the plaintiff from Michaelmas then next; and thereupon afterwards, to wit, on &c., by a certain other agreement then made between the plaintiff and the defendant, the plaintiff agreed to set the said farm to the defendant from Michaelmas then next, as a yearly tenant, for the sum of 180*l.*, and 1*l.* 10*s.* land tax, provided the defendant should find and produce sufficient and good securities for the regular payment of the rent; the said rent to be paid on certain days in the said agreement more particularly mentioned: and by the last-mentioned agreement it was fur-

A breach, in an action by landlord against tenant, that the tenant threatened to commit waste, unless he were paid a certain sum by the incoming tenant, and that the latter was thereby compelled to and did pay him that sum, in order to prevent his committing such waste, is bad.

Where general damages are given on a declaration, in which several breaches are assigned, one of which is bad, the Court will not arrest the judgment, but will award a venire de novo.

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ther agreed, that when the defendant should quit the said farm, he should not carry away or dispose of any straw, either threshed or unthreshed, or thatch, nor any dung the produce of the said farm, or on the said farm at the time the defendant should quit; and that the defendant should keep the houses and fences of the said farm in good repair, and should commit no waste on the said farm, and that he, the defendant, would not sow any lay corn the last half year of his residence on the said farm, but would agree to the terms contained in a certain other paper, to wit, in the said first-mentioned agreement. The declaration then averred mutual promises, and alleged that the plaintiff, on the 29th Sept. 1832, set the farm to the defendant from Michaelmas in the secondly mentioned agreement mentioned, as yearly tenant, and that the defendant entered into and became possessed of the farm as the tenant thereof, on the terms in that agreement mentioned and referred to, and continued so possessed until the 29th September, 1834, when his tenancy therein determined: and after averring the plaintiff's readiness to perform the stipulations of the first agreement, and that the incoming tenant wished to purchase of the defendant all the clover-hay, and meadow-hay, and corn of the farm, and that the plaintiff was ready and willing to fix on a person to value it, and requested the defendant to fix on a person for that purpose, and to sell the same to the incoming tenant on the terms mentioned in the agreement,—assigned the following breaches:—first, that the defendant, when he was quitting the farm as aforesaid, to wit, on &c., carried away, and also disposed of and suffered to be carried away, certain quantities of dung the produce of the said farm, and of dung which was on the farm when he was so quitting, and of threshed and unthreshed straw the produce of the farm; secondly, that he did not nor would, when so requested as aforesaid, sell to the incoming tenant the said clover-hay, and meadow-hay, and corn, at such valuation as aforesaid, and did not nor would fix on a

valuer on his part to value the same; thirdly, that the defendant *threatened* to carry away from the farm, or to dispose of, other dung the produce of the farm, if the incoming tenant would not pay him divers large sums of money, amounting to 100*l.*, for the same; and that he would have so carried away and disposed of the said last-mentioned dung, if the said incoming tenant had not paid him such monies, and he thereby then compelled the said incoming tenant either to pay him, the defendant, such monies as aforesaid, or to suffer the dung to be so carried away and disposed of by the defendant as aforesaid; whereupon the said incoming tenant, being so compelled as aforesaid, paid to the defendant the said monies for the said dung, in order to prevent the same from being so carried away and disposed of. The fourth breach was similar to the third, except that it stated the amount demanded in payment from the incoming tenant for the dung to be divers monies, exceeding one shilling a load by a large amount, to wit, 100*l.*: the fifth breach charged the defendant with the commission of divers acts of waste, by removing doors, chimney-pieces, &c., affixed to a dwelling-house, part of the demised premises, and by permitting the houses and fences of the farm to be in bad repair: the sixth breach stated that the defendant, when he was quitting the farm, threatened to commit further waste, if the incoming tenant would not pay certain money, to wit, 20*l.*, to him, the defendant, and that the incoming tenant was thereby compelled to pay the same, &c., (in similar terms to those of the third breach): the seventh breach was for sowing and cropping fifty acres of the farm with lay corn, to wit, with oats, on the last half year of the tenancy, contrary to the agreement. The defendant pleaded—first, to the first and second breaches so far as they related to the corn and straw, a written license from the plaintiff to him the defendant to sell it by auction, and that he did accordingly sell it, and suffer the purchasers to carry it away.

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Secondly, to the residue of the first breach, leave and license generally. Thirdly, to the residue of the second breach, that the defendant was ready and willing to sell the clover-hay and meadow-hay therein mentioned to the incoming tenant, at a fair valuation, according to the agreement, but that the incoming tenant did not communicate to the defendant any wish to purchase it, nor would he or the plaintiff fix on a person to value it. Fourthly, to the third breach, that the defendant did not threaten to carry away or dispose of the dung therein mentioned, &c., in manner and form as in that breach alleged; concluding to the country. Fifthly, a similar plea to the fourth breach. Sixthly, as to so much of the fifth breach as related to one chimney-piece and one gate, that the defendant removed them as being ornamental tenant's fixtures put up and erected by him. Seventhly, to the remainder of that breach, a denial of the commission of the waste therein mentioned. Eighthly, to the sixth breach, a similar plea to those pleaded to the third and fourth breaches: and lastly, to the seventh breach, that he did not sow or crop, &c., as therein alleged.

Replication and new assignment to the first plea, as to the straw in the first breach mentioned, that the plaintiff brought his action, and assigned that breach in respect of other and different straw from that which the defendant was so licensed and permitted to sell and dispose of as in the plea mentioned, &c.: to which there was a plea of not guilty. The plaintiff also denied the leave and license set up in the second plea; traversed the allegation in the sixth plea, that the chimney-piece and gate therein were ornamental tenant's fixtures erected and put up by the defendant; joined issue on the fourth, fifth, seventh, eighth, and last pleas; and entered a nolle prosequi as to the second breach, to which the third plea was pleaded.

At the trial before *Patteson, J.*, at the Pembrokeshire Summer Assizes, 1835, the plaintiff had a general verdict

on all the issues—damages, 20*l.* In the following Michaelmas Term, *Exch. of Pleas,*
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Evans obtained a rule nisi to arrest the judgment, on the ground that the third, fourth, and sixth breaches were bad. The case stood over for some time, in order that an application might be made to the learned Judge to amend the record; but his Lordship having declined to do so,

E. V. Williams and *Leach* now shewed cause.—The defendant is not entitled to arrest the judgment; even if any of the breaches be bad, he can be entitled only to a venire de novo. But the three breaches objected to are sufficient legal breaches. The defendant was bound by the agreement, absolutely and unconditionally, to leave on the premises all the dung, the produce of the farm: is it not a legal breach of such agreement, that he refused to leave it without receiving payment for it? So also, for dung driven on the land he is to be paid no more than 1*s.* a load; is it not a legal breach that he insists on receiving a larger sum? The argument on the other side is, that the plaintiff has sustained no damage by reason of these breaches, the whole having been done between the defendant and the incoming tenant. But *Anderson v. Martindale* (a) is an authority to shew that the plaintiff may sue, the agreement being one in which the landlord and the incoming tenant have a joint legal interest. [*Parke, B.*—You may perhaps support those two breaches, but how can you sustain the sixth breach? The defendant does not actually commit waste, but only threatens to do it; he does not commit it, because the incoming tenant pays him the money]. Then, admitting that breach to be bad, the judgment ought not to be arrested, but a venire de novo awarded. In *Tidd's Practice*, p. 922, (9th ed.), one of

(a) 1 East, 497.

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the cases in which it is said that a venire de novo is grantable is, "when the jury give general damages on a declaration consisting of several counts, and it afterwards appears that one or more of them is defective." *Eddowes v. Hopkins* (a), and *Grant v. Astle* (b), are authorities to support this position. *Richardson v. Mellish* (c), *Angle v. Alexander* (d), and *Day v. Robinson* (e), are cases in all of which a venire de novo was awarded where general damages were given on several counts, one of which was bad: and a bad breach is not distinguishable in this respect from a bad count. In *Trevor v. Wall* (f), which will be referred to for the defendant, the Court undoubtedly refused a venire de novo, and arrested the judgment altogether; but that was on the ground that the proceedings originated in an inferior court, in which case a court of error has no power to grant a venire de novo.

Evans, contra.—*Holt v. Scholefield* (g) is a distinct authority to shew that where some counts are good and others bad, and general damages are given, the Court will arrest the judgment and not award a venire de novo. *Sicklemore v. Thistleton* (h) is to the same effect. *Eddowes v. Hopkins* does not apply; that was an application to amend the entry of the verdict on the postea by the Judge's notes. In the other cases cited for the plaintiff, the venire de novo was awarded by the Court of error.

PARKE, B.—This case must go down to a new inquiry. On this verdict we know that the defendant has been guilty of all the breaches assigned, but we do not know what amount of damages are to be ascribed to each. Our pre-

(a) Dougl. 377.

(b) Ib. 722.

(c) 3 Bing. 349.

(d) 7 Bing. 119; 4 M. & P. 870.

(e) 554. 4 Nev. &

M. 884.

(f) 1 T. R. 151.

(g) 6 T. R. 691.

(h) 6 M. & Sel. 9.

sent decision is undoubtedly at variance with that of *Holt v. Scholefield*; that case, therefore, must be considered as overruled as to this point. If the Court of error can grant a venire de novo in such a case as this, à fortiori the Court having original jurisdiction in the cause may do so. Unless, therefore, the parties can agree on some terms of compromise, the rule must be absolute for a venire de novo, in order that the jury may assess the damages on the good breaches.

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ALDERSON, B.—It does not appear that this point was at all argued in *Holt v. Scholefield*, though *Grant v. Astle* was referred to; the whole of the argument was addressed to the question as to the sufficiency of the declaration.

Venire de novo awarded (a).

(a) See, however, 2 Saund. 171, a; *Hancock v. Haywood*, 3 T. R. 434, per Buller, J.

SAMUEL BOYDELL v. CHAMPNEYS.

ASSUMPSIT by drawer against acceptor of a bill of exchange, with counts for work and labour as an attorney, and on an account stated; to which the defendant pleaded his discharge under the Insolvent Debtors' Act. At the trial before Alderson, B., at the Middlesex Sittings in Hilary Term, it appeared that the bill was accepted by the defendant in payment for business done for him by the plaintiff as an attorney, and was indorsed by the plaintiff to one Charles Boydell, in part payment of a debt due to him. It was dishonoured when due, and Charles Boydell sued the defendant upon it to judgment. The defendant shortly afterwards took the benefit of the Insolvent Debtors' Act, having inserted Charles Boydell (but not the plaintiff) in his schedule as a creditor for the amount of the bill. After

An insolvent debtor, who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies the statute (7 Geo. 4, c. 57, s. 46), is discharged as to all the parties to the bill (although they are not named in the schedule), and also as to the original debt for which it was a security.

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the defendant's discharge, Charles Boydell handed back the bill to the plaintiff, and he brought the present action. For the defendant, it was contended that his discharge under the Insolvent Act operated as a bar to any action on the bill, as well by the plaintiff as by Charles Boydell. The learned Judge reserved the point for the opinion of the Court, and the plaintiff had a verdict. *Chandless* having obtained a rule nisi for a nonsuit, pursuant to leave reserved,

Erle and Jardine now shewed cause.—There is no question, that by reason of the defendant's discharge under the Insolvent Act, 7 Geo. 4, c. 57, Charles Boydell, who was expressly named in his schedule as a creditor, was barred from suing on the bill. But upon the dishonour of the bill, the part payment, as between the plaintiff and Charles Boydell, ceased to exist; the latter, therefore, had then a right to call upon the plaintiff to pay him over again the amount of the bill, and thereupon the plaintiff was remitted to his right to sue the defendant on the original consideration between them, viz., the work and labour. There is no provision in the Insolvent Act which can have the effect of rendering the discharge of a debtor a bar to any other party on a bill than those mentioned in the schedule, much less to extinguish the original debt, to secure which it was given. [*Parke, B.*—The effect of the transfer of a bill of exchange is to transfer the *debt*, and to render the indorsee for the time the creditor; if, then, the debt be discharged, it cannot be revived again. Suppose a release be given by the holder to the acceptor, and the holder afterwards calls on the drawer to pay the bill, and he does so—the acceptor is nevertheless discharged]. At all events, the statute is a bar to an action *on the bill* only at the suit of the parties named in the defendant's schedule. Section 46 empowers the Court to discharge the prisoner, “as to the several debts and sums due, or

claimed to be due, to *the several persons named in his schedule* as creditors." He is bound, therefore, to insert in his schedule all parties who can be affected by his discharge. The proviso at the end of that section, that he shall be discharged also as to the claims of all persons not known to him at the time of the adjudication, who may be indorsees or holders of any negotiable security set forth in the schedule, only protects him where he puts into his schedule the names of all the known parties to the instrument. [*Parke, B.*—The statute does not say he is to be discharged as to the persons mentioned in the schedule, but as to the debts due to them. There can be no doubt that this was, at the time of the defendant's discharge, a debt due to Charles Boydell, having been transferred to him by the indorsement of the bill. It would clearly have been a defence to an action for the work and labour, that a bill had been given by the defendant, and was outstanding in the hands of a third party]. The right of action was no doubt suspended during the currency of the bill, but the plaintiff still remained a creditor for the original debt until payment of the bill. In *Macdonald v. Bovington (a)*, where the holder of a bill sued the acceptor to judgment, and charged him in execution, and he was discharged under the Lords' Act, and the holder then sued the drawer, who paid the bill, and in his turn sued the acceptor, and charged him in execution, it was held that the charging in execution at the suit of the holder was no satisfaction as between the drawer and the acceptor. In *Mead v. Braham (b)*, it was held that the drawer of a bill, who paid the amount to the holder after a commission of bankruptcy against the acceptor, might sue the acceptor before he had obtained his certificate, and arrest him on the bill, though the holder had proved the bill under the commission. [*Parke, B.*—The election of the holder to prove under the commission could not affect the other parties to the

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(a) 4 T. R. 825.

(b) 3 M. & Sel. 91.

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bill. Lord *Abinger*, C. B.—There was there no satisfaction or discharge even as to the holder—he might have proceeded at law]. The 41st section expressly keeps alive the debt, and only bars the right of action, putting the creditor to come in for the dividend.

Chandless, contra.—*Macdonald v. Bovington* was a decision on the Lords' Act, the object of which is merely the personal discharge of the debtor as to the particular creditor at whose suit he is imprisoned, on giving up his property to him. But the object of the Insolvent Act is to make a general arrangement for the discharge of the party as to all his creditors. The intention of the legislature, in sect. 46, obviously was, not merely to discharge the relation of debtor and creditor as between the insolvent and the persons named in the schedule, but to discharge him from all liability in respect of the *debts* specified therein: the *persons* being inserted merely as descriptive of the debts. Here the debt due to Charles Boydell was clearly the same debt which Samuel Boydell now claims. The effect of giving the acceptance was only to give the original debt a capacity of being transferred by the indorsement; and the indorsee thereby acquired the privilege which the original creditor alone would otherwise have had, of being inserted in the insolvent's schedule, and opposing his discharge. It is impossible that *two* debts can be created by giving the bill in place of the original liability. The proviso at the end of sect. 46 applies to cases where the insolvent may not know the actual holder at the time, though he may know the drawer, or other previous parties. [He was then stopped by the Court.]

Lord ABINGER, C. B.—I am of opinion that the rule ought to be made absolute. The case of *Macdonald v. Bovington* has no application to the present. The object of the Lords' Act is only to discharge a prisoner from gaol as to the particular creditor who is pressing him; it

does not say a word as to discharging an insolvent from debt. But the Insolvent Act seems to me to put the insolvent debtor on precisely the same footing as a certificated bankrupt; he is to be discharged from all his liabilities and debts up to the time of his obtaining his discharge. As to the case of *Mead v. Braham*, it certainly has no application to the present; for that was a case where the bankrupt could not under the circumstances have obtained his certificate, and therefore was still liable for all he might have owed before his bankruptcy: but here, as it appears to me, the debt itself is discharged; and that being so, there is no law that will authorize us to say that the insolvent may be sued again on the original liability: on the contrary, the act of Parliament seems sedulously to give the debtor an opportunity to be discharged absolutely from the debt; and if it should so happen that he does not know the name of the holder of a bill of exchange on which he is liable, he is then at liberty to give the best description he can of it—he may put in his schedule the name of the original drawer, and so be discharged from the bill as to all other parties. If he knows the name of the holder of the bill, that is the name he is to insert, and that is a sufficient description of the bill of exchange; and if the debt be discharged as between him and the holder, it cannot afterwards be revived in any case against him, for it is apparent that the intention of the legislature was to discharge him from all his debts. If the law were otherwise, the operation of the act would be altogether inconsistent with its object and policy; for it might happen, in a great variety of cases, that although the debtor would be discharged from prison as to a particular class of debts enumerated in his schedule, yet all those persons to whom he might have given bills of exchange would have a right to sue him again. The argument may as well be applied to indorsees as to drawers; if the debt is not so discharged as to relieve him altogether from liability, the

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next indorser might also sue him, and the next again, and so on if there were twenty names on the back of the bill; and he would be discharged against none except the person whose name was in the schedule. The obvious meaning and intention of the act of Parliament was to discharge the party from all his debts, on his giving in his schedule the best account he could of them, so that the parties interested might have notice what debts he sought to be discharged from. In this case he had inserted the name of the party whom he considered to be the holder of the bill of exchange, and that was sufficient notice to all persons interested in the bill of exchange to look after him.

PARKE, B.—I am of the same opinion. The case of *Macdonald v. Bovington* turned on the provisions of the Lords' Act, the intention of which was not to discharge the defendant from the *debt*, but only his person from imprisonment. The scope and provisions of the Insolvent Debtors' Act are very different: when the insolvent has inserted the debt fairly and properly in his schedule, he is discharged as to the debt itself, and not merely as to the particular creditors named in the schedule. I think this conclusion necessarily follows from a comparison of the 46th & 61st sections. Section 46 empowers the Court to adjudge that the prisoner shall be discharged from custody and entitled to the benefit of the act, "as to the several *debts or sums of money*"—not as to the several creditors—"due or claimed to be due at the time of filing such prisoner's petition from such prisoner to the several persons named in his schedule as creditors, and as to the claims of all other persons, not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule." The object of the latter part of the clause is, that where the prisoner is indebted on a negotiable security, and

where he could not be reasonably expected to know the name of the holder, he may be discharged without stating the name, provided the instrument itself be sufficiently described in the schedule, so as to satisfy the Court that he has given a true description of it. That appears to me the rational and plain construction of the 46th section: and it is confirmed by the 61st, which provides that after the party shall have become entitled to the benefit of the act, no writ of fi. fa. or elegit shall issue on any judgment obtained against him for any *debt* or sum of money with respect to which he shall have so become entitled, nor in any action on any new contract or security for payment thereof. This view agrees with the construction put by the Court on former Insolvent Acts, not containing a similar clause to that at the end of section 46, expressly enabling the insolvent to describe negotiable securities without stating the holders' names. Thus, in *Reeves v. Lambert (a)*, it was held, on the 1 Geo. 4, c. 119, s. 6, that a statement in the schedule that the insolvent was indebted to A. for goods, and that A. held his acceptance for the amount, which became due in October 1823, was a true description of the person to whom the insolvent was indebted, within the meaning of the act, although A. had indorsed the bill to B., the insolvent being ignorant of that fact; and the conclusion of the judgment is in these terms:—"Besides, the prisoner is discharged as to the debts mentioned in the schedule. Here the defendant has mentioned the original debt in his schedule, and he is discharged by force of the Insolvent Act as to that debt, and being discharged as to that debt, he is discharged from any claim arising by reason of a security given for that debt." That was the view taken by the Court, when the statute did not contain the enactment to which I have referred, which shews still more strongly the intention of

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the legislature. If the insolvent were not discharged as to the debt itself, it would be an exceedingly hard case upon him, because, as to debts secured by negotiable instruments, he would never be free from liability.

ALDERSON, B.—I am of the same opinion, that by force of the Insolvent Act the prisoner is discharged from *the* debt, and that the only object of the particular expressions referred to in section 46, is to identify the debt in respect of which he is to be discharged; and this construction is confirmed by the last clause, by which, when he does not know the holder of a negotiable security, the debt is to be identified by setting forth the security itself. The only object is to identify the debt, and to discharge the prisoner from that debt when identified. The same appears from the cases deciding that where the instrument is not quite accurately described, if it be so stated as that the parties cannot be misled, it is sufficient to entitle the prisoner to his discharge.

Rule absolute.

MAGEE v. ATKINSON and TOWNLEY.

A., a broker employed by B. to sell certain railway shares, agreed with C., D.'s broker, to sell him fifty

ASSUMPSIT to recover damages for the breach of an agreement to deliver fifty Great Western Railway Shares. The defendants traversed the promise and consideration.

shares, of which A. afterwards informed his clerk at his office, who made an entry in the book as of a sale from A. to C.; and a contract note, to the same effect, was sent to C. A. subsequently saw the entry in the book, and altered it by writing the name of B. as seller, and directed another note to be sent to C., with the name of B. as seller. A fresh note was accordingly sent the same evening or the next morning, but C. received them both together the next morning. C. did not return the first note, nor did A. request to have it returned. In an action brought by D. against A. for breach of the agreement, in not completing the sale, the learned Judge who tried the cause left it to the jury to say whether the second note was a correction of a mistake in the first, and told the jury that if the defendant entered into a written contract in his own name, he could not afterwards set up that he was acting as broker merely; and that, although known to be a broker, if he signed the contract in his own name, he was liable:—*Held*, that this was no misdirection. *Held*, also, that evidence that it was the custom in Liverpool to send in broker's notes without disclosing the principal's name, was properly rejected.

At the trial before *Patteson, J.*, at the last Liverpool Assizes, it appeared in evidence that the defendants were share-brokers in Liverpool; that in the month of December last, Scholes, the plaintiff's broker, met the defendant Townley, and agreed with him for the purchase of the shares in question. The defendant Townley had himself received orders from a Mr. Jacob to sell the shares for him. After the bargain with Scholes, Townley went to his office and communicated to his clerks that he had effected a sale of fifty shares to Scholes, and then went on 'Change again. One of the clerks then made an entry in the book of a sale as from the defendants to Scholes, and a contract note to the same effect was sent to Scholes. Shortly afterwards Townley returned again to his office, and communicated to his clerks that he had effected another sale to a person of the name of Buttley, and directed notes to be made out and sent to Scholes and Buttley. He then learnt that the note to Scholes had been sent, and finding it to have been sent in the defendants' name, he altered the entry in the book, by inserting the name of Jacob as seller, and directed another note to be sent to Scholes with Jacob's name as seller. A fresh note was sent accordingly either that evening or the next morning, and Scholes the next morning received the two notes together. Scholes did not return the second note, nor did the defendants wish to have the first returned. Some evidence was given of an alleged admission of liability by the defendants.

The learned judge left it to the jury to say, whether the second note was a correction of a mistake in the first; and he told the jury that if the defendants entered into a written contract in their own names, they could not afterwards set up that they were acting as brokers merely; and although known to be agents, if the defendants signed the contract in their own names, they were liable.

Evidence was also tendered at the trial to shew that it was the custom in Liverpool to send in broker's notes

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without disclosing the principal's name, but this evidence was rejected. The plaintiff having recovered a verdict for 359*l.*,

Alexander now moved for a new trial, on the ground of misdirection, and of the rejection of evidence.—He contended that the evidence of the usage ought to have been received ; and that, as Mr. Scholes must have known that the defendants were brokers, and were acting as agents, they were not personally liable, and that the learned judge ought so to have directed the jury. He cited *Wilson v. Hart* (a).

PARKE, B.—I do not see any default in the rejection of evidence, because the object of the evidence tendered was to alter the written contract. It was purely a question for the jury, and was properly left to them to consider whether the second note was a mere correction of a mistake, or whether the contract was that stated in the first note. The defendants ought to have asked to have the first note given back. There must be no rule.

ALDERSON, B.—The custom offered to be proved is a custom to violate the common law of England. It was properly left to the jury to say whether the second note was a disclosure of the principal's name at the time of the contract, or whether it was adopted as a variation of the contract.

Rule refused.

(a) 7 Taunt. 295.

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WILLIAM STONE, Executor of BENJAMIN ROGERS, *v.*
SARAH ROGERS, Executrix of GEORGE ROGERS.

DEBT for goods, cattle, stock, and other merchandize, sold and delivered by the plaintiff's testator to the defendant's testator, and on an account stated between them. Pleas, first, *nunquam indebitatus*: secondly, a set-off for work done by the defendant's testator with his horses, cattle, ploughs, &c., and for meat, drink, washing, and lodging provided by him, for the plaintiff's testator, and on an account stated between them; which was denied by the replication. The plaintiff's particulars of demand were as follows:—

"This action is brought to recover the sum of 75*l.* 10*s.*, the price and value of goods sold and delivered by the said Benjamin Rogers in his lifetime to the said George Rogers in his lifetime, the particulars whereof follow; and on an account stated:—

	£	s.	d.
Hay, at - - - -	7	0	0
Apples - - - -	10	0	0
Wheat - - - -	16	10	0
2 bullocks - - - -	21	0	0
8 sheep, at 2 <i>s.</i> - - - -	10	8	0
12 lambs, at 16 <i>s.</i> - - - -	9	12	0
Hurdles - - - -	1	0	0
	<hr/> £75 10 0 <hr/>		

By a written agreement, A. agreed with B. that B. should have his (A.'s) farm for his life for 20*l.* a year rent, and the whole of A.'s keep and maintenance; B. to take off the stock at 75*l.* 10*s.* B. having taken the stock, and had possession of the land for his life;—

Held, that his executor might be sued for the 75*l.* 10*s.* in an *indebitatus* count for goods sold and delivered.

Held, also, that inasmuch as the instrument could operate only as an agreement to grant B. a future lease of the farm for his life, it was properly stamped with a 1*l.* stamp.

At the trial before *Williams, J.*, at the last Somersetshire assizes, the facts appeared to be as follows:—

The plaintiff's and defendant's testators, Benjamin and George Rogers, were brothers, and both farmers, the former residing in the house of the latter, at Wiveliscombe, Somersetshire, and farming a copyhold estate

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belonging to him, called Davy's, about a mile distant. Benjamin Rogers being in ill health, and unable to attend to his farm, on the 10th September, 1836, the brothers came to the following agreement, which was produced in evidence, stamped with a 1*l.* agreement stamp:—

“ An agreement between Benjamin Rogers and George Rogers, (that is to say), George Rogers to have my tenement called or known by the name of Davy's, situate at Croford, in the parish of Wiveliscombe, in the county of Somerset, for 20*l.* a year, and the whole of my keep and maintenance during the said life of George Rogers, and to take possession immediately, and begin to pay rent at Michaelmas; the said George Rogers to find reeds, lime, gads, and horse labour for drawing materials to repair the cyder press engine, and 24 hogsheads to remain on the place; *and to take off the stock at 75*l.* 10*s.**, and to pay for the grass seed. The stock are as follows, [then followed the same enumeration of articles, at the same prices, as in the bill of particulars]. As witness our hands this 10th day of September, 1836.

“ Benjamin Rogers.

“ W. Stone.

“ E. R. Stone.”

It was objected for the defendant, on the production of this instrument, that it was inadmissible in evidence for want of a lease stamp; and *Corder v. Drakeford* (a) was referred to. The learned judge was of that opinion, but received the evidence, giving the defendant leave to move to enter a nonsuit. It was proved by E. R. Stone, (who signed the agreement as the agent of George Rogers, and who was a nephew of the two brothers), that he valued the stock, &c. at Davy's, mentioned in the agreement, at the sum of 75*l.* 10*s.*; and some evidence was given of George Rogers and his widow (the defendant) having, sub-

(b) 3 Taunt. 382.

sequently to the agreement, sold and received the money for some of the cattle on the farm at Davy's, and having gathered the apples. Benjamin Rogers died very soon after the execution of the agreement, and George in the month of October following. Proof was given of admissions by George Rogers and the defendant that he had bought the goods at Davy's for 75*l.* 10*s.*: and it was proved also, that after this action was brought, the defendant's attorney sent his clerk to the plaintiff's attorney to pay the 75*l.* 10*s.*; the plaintiff's attorney, however, declined to receive it unless the costs were also paid or secured, and required a cognovit, which the defendant's attorney refused to give. On this evidence the jury found a verdict for the plaintiff, damages 75*l.* 10*s.*

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On a former day in this term, *Bompas*, Serjt., obtained a rule nisi for a nonsuit, pursuant to the leave reserved; against which

Erle and *Bere* now shewed cause.—The instrument given in evidence purports to pass the tenement called Davy's to George Rogers for his life. But not being under seal, no estate of freehold could pass by it; therefore, as it cannot operate as a lease for life, it must be construed, in order to give it any operation, as an agreement only for such a lease, and as such is properly stamped with an agreement stamp. [The Court having called on *Bompas*, Serjt., to answer this argument, he objected that in that case the agreement could not be declared upon in the general count for goods sold and delivered, but that the whole consideration for the contract of the defendant's testator, of which the agreement for the possession of the land was a part, must be stated on the record]. Whenever a special contract for the sale of goods has been actually performed, it may be declared on as for goods sold and de-

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livered; *Leeds v. Burrows* (a); Selw. N. P. 71, (7th ed.); 1 Chitty on Pleading, 372, 381 (5th ed.) Here, there is no doubt that the contract had been fully executed; George Rogers and his widow were in possession of the land, and had taken the goods; and the time has run out within which any part of the agreement could remain to be performed. Every thing has been done which was to be done in order to put the defendant under a liability to pay the price of the goods. The admission of the defendant's attorney of itself clearly shews that a debt existed for the sum of 75*l.* 10*s.* But it may also be contended that this is a divisible agreement; and that the stipulation for granting a lease is altogether independent of the contract for the sale of the goods. The consideration for the demise is the maintenance of Benjamin; the consideration for the payment of the money is the sale and delivery of the goods.

Bompas, Serjt., and *Butt*, contra.—It is clear that a count in assumpsit must state the whole consideration for the defendant's promise; *Clarke v. Bray* (b). [*Parke*, B.—That was not the case of an indebitatus count]. There is no difference as regards the application of this rule between a special and a general count. [*Parke*, B.—It is clear that the rule which requires that *no more than* the whole consideration be stated, does not apply to indebitatus assumpsit]. That is because an indebitatus count—as for goods sold and delivered—is as it were multifarious; the plaintiff may recover under it on any number of different contracts: but the *goods sold and delivered* form the whole consideration. In covenant, it has been held that if the whole consideration be not set out as stated in the deed, it is a fatal variance; *Swallow v. Beaumont* (c). Here the considera-

(a) 12 East, 1.

(b) 6 East, 564.

(c) 2 B. & Ald. 765; 1 Chit. Rep. 518.

tion is clearly one and entire; and the contract is not, as has been contended on the other side, a divisible one. [*Parke, B.*—I do not think it is divisible; the parties would doubtless never have taken to the goods but for the agreement that they should have the farm. But the question is, whether, when the plaintiff has performed the whole of his agreement, the defendant does not become a *debtor* for the goods, so as that they may be sued for as goods sold and delivered]. The consideration is in no degree varied by part of the agreement being performed. The cases in which it has been held that when the whole of a special contract has been performed, the indebitatus count for goods sold and delivered is sufficient, are cases in which the whole of the complicated consideration, when performed, does amount to a simple sale of the goods: as where many different descriptions of goods are to be delivered—when they have been delivered, the general count applies. But this is the case of a joint consideration, a part of which cannot, when executed, be correctly expressed as being goods sold and delivered:—it is goods sold and delivered, *and* the agreement for a lease, conjoined. At all events, the plaintiff ought to have shewn by distinct and express evidence that all the things had been done which his testator stipulated to do, and that nothing remained to be done but the payment of the money.

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PARKE, B.—I am of opinion that this rule ought to be discharged. The question comes before the court in consequence of the point reserved by the learned judge, but not exactly in the way in which it was presented by that reservation: however, the point having been reserved, we may deal with the whole case, and see whether, under all the circumstances, the plaintiff is entitled to recover. This is an action by the executor of one testator against the executor of another testator, for goods sold and delivered, to which there is a plea of the general issue. To prove

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the plaintiff's case, the agreement was put in: it was objected that it is not properly stamped; so it appeared to the learned judge; he, however, received the document in evidence, and admitted also other evidence of the transactions between the parties, reserving for the consideration of the court the question whether the agreement was rightly received. I think the learned judge was right in receiving it, and that it was properly stamped; because, on looking to it, it appears to be nothing but an *agreement*, and to have no other operation. It is to this effect; Benjamin Rogers agrees that George shall have his farm for his life for 20*l.* a year and the maintenance of Benjamin, to take possession immediately; and George agrees to take the stock and goods therein enumerated for 75*l.* 10*s.*, according to the valuation annexed. It is clear that this instrument could not operate as a lease, but only as an agreement to grant a future lease, for the life of George Rogers; and therefore it was properly stamped. Then, *primâ facie*, the latter stipulation would entitle the plaintiff to recover, if he shewed that the defendant's testator had taken to the stock, and had had possession of the land: and there was such evidence in this case—in particular, the admission by the defendant's attorney, which went to shew that the testator had had everything which made him liable to pay the 75*l.* 10*s.* for the goods. The next objection made is that, supposing the plaintiff to be entitled to recover in some form of action, he cannot recover in this form, as for goods sold and delivered. But I think this form of declaration was proper in this case. The rule is properly laid down by Mr. Starkie (*a*), that “where the terms of a special agreement have been performed so as to leave a mere simple *debt* or *duty* between the parties, the plaintiff may give the circumstances in evidence, and recover under a general count of *indebitatus assumpsit*.” The question therefore is, whether there is

(*a*) 1 Stark. Evid.

evidence that everything was done which would leave the defendant's testator in the simple relation of debtor to the plaintiff's testator for goods sold and delivered; and as I have already intimated, I think there is such evidence. There might be a difficulty if no precise sum were stated as to be paid for the goods sold and delivered—if an entire sum were payable for the grant of the lease *and* for the goods; but the agreement distinctly expresses that the sum of 75*l.* 10*s.* is to be paid for the goods alone. If, then, that has been done which leaves the party in the simple relation of debtor for the goods, he may be sued as for goods sold and delivered; and there was ample evidence for the jury that such was the case. If the stipulation had been for an actual present lease to be granted, the party would not have been bound to pay for the goods until that stipulation was performed; but even in that case, there would be some evidence to go to the jury of that; the admission of the defendant's attorney would be some evidence that everything had been done which could entitle the plaintiff's testator to payment for the goods. But the actual grant of the lease was clearly no condition precedent to the payment; the only condition precedent was that which the agreement itself in its very frame accomplished, viz. the agreement to grant a lease. All, therefore, has been done which made the one party simply the debtor of the other. I give no opinion whether such would be the state of things where there was one entire price agreed on for the goods and for something else also; there, however, the question might arise (as indeed it might in this case), whether the taking to the goods would not raise a new implied contract to pay for them according to their value. But it is not necessary to put this case upon that ground: my judgment proceeds on this,—that here is a stipulated price for stipulated goods, and that everything was done which made it obligatory on the party to pay that price for those goods as for goods sold and delivered.

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BOLLAND, B.—I am of the same opinion. It is said for the defendant, and I think truly, that if there be a special agreement in consideration of a number of different things to be done, all those things must be proved to have been done in order to entitle the plaintiff to recover: and but for the admission of the defendant's agent, of her liability for the 75*l.* 10*s.*, this case would in my opinion have stood on very different grounds. If the defendant had had everything specifically proved which she now requires should have been proved, she would be in no different situation from that in which this admission of her agent places her, because it amounts to this, that everything was done which was to be complied with in order to make her liable. If that admission had not been an ingredient in the case, I should have taken a very different view of it.

ALDERSON, B. concurred.

Rule discharged.

MINSHALL and Another v. LLOYD, Esq.

In 1824, A. leased to B. for 21 years, a colliery, with the right of putting up steam-engines, &c. &c.,

for working it, subject to a proviso for re-entry on non-payment of rent or insolvency. B. erected on the colliery several steam-engines, affixed in the ordinary way to the soil, and afterwards, in 1827, assigned the colliery, with the engines, implements, &c. in use upon it, to trustees, in trust to permit B. to enjoy them until default in payment of an annuity granted by him; and on such default to take possession, and sell them and pay the arrears. In June, 1829, A. recovered possession of the premises in ejectment brought in pursuance of the proviso for re-entry. In November, 1829, the engines and other articles on the colliery were seized under a *fi. fa.*, at the suit of an execution creditor of B.:—*Held*, that the trustees could not recover the steam-engines in trover against the sheriff:—*Held* also, that the omission of the trustees to take possession on B.'s default in payment of the annuity, did not avoid the assignment.

In an action of trover against the sheriff, for goods seized under a *fi. fa.*, the warrant of seizure was not produced, nor any notice given to produce it. It was proved that the sheriff's officer who made the seizure had put his son into possession, and given the warrant to him; the son stated that he believed he returned it either to his father or to the sheriff's office. The officer said that it was his custom to deliver the warrants to the auctioneer, that they might be transmitted with the auction sheet to the Excise-office, through the supervisor of excise for the district: that he had searched his own papers for it, and had inquired for it at the sheriff's office. A search was also proved among the auctioneer's papers, and at the Excise-office; but the supervisor was not called, nor any search of his papers proved:—*Held*, that reasonable proof was given of the loss of the warrant, so as to let in secondary evidence of its contents, in order to connect the sheriff with the officer.

and chattels in the declaration mentioned were not the property of the plaintiffs; thirdly, the Statute of Limitations: on which issues were joined. At the trial before *Vaughan, J.*, at the Denbighshire Summer assizes, 1836, the facts appeared to be as follows:—

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By lease, dated 1st June, 1824, Mrs. Sarah Youde, being tenant for life of an estate called the Plas Madoc estate, and certain collieries therein, called the Plas Madoc collieries, in the parish of Ruabon, in the county of Denbigh, demised to her son Edward Youde, who was tenant in remainder of the same property, all the mines of coal and other minerals being in and upon the said hereditaments and premises called the Plas Madoc estate, for twenty-one years, at an annual rent of 300*l.*, with power to him to erect and set up steam and other engines, machinery, &c. &c., necessary for working the mines; subject to a proviso for re-entry on default in payment of the rent for forty days after any of the days appointed for payment, or if the lessee, his executors, &c., should make any assignment for the benefit of his creditors, or should become insolvent. In the course of the years 1825 and 1826 Edward Youde placed on the premises various engines, machinery, and implements, including those which were the subject of this action. The steam-engines and other stationary machinery were let into the ground in the usual manner. By indentures of lease and release, dated the 3rd and 4th January, 1827, Edward Youde, in consideration of 5,000*l.*, granted to Mrs. Elizabeth Whalley an annuity of 850*l.* during his life, and conveyed and assigned to the plaintiffs, Messrs. Minshall and Veysey, as trustees for Mrs. Whalley, all his interest in the Plas Madoc mansion-house and estate, the mines of coal and other minerals lying within or under the same, and all the steam-engines, boats, waggons, horses, carriages, and other things of him the said Edward Youde which then were, or at any time during the continuance of the annuity

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should be, used or employed in the mining, working, and carrying away of such coals and other mines and minerals, upon trust to permit Edward Youde to hold and enjoy the said hereditaments and premises until default should be made in payment of the annuity for two calendar months after any of the days of payment, and on such default to enter, and sell and dispose of them in order to satisfy the arrears. Edward Youde continued to work the mines on his own account until the month of November, 1827, when he underlet them, for fourteen years to the plaintiff Veysey, together with two other persons of the names of Jackson and Saunders. The rent of 300*l.* reserved by the original lease having fallen into arrear, and Edward Youde being in a state of insolvency, Mrs. Youde brought an ejectment to recover possession of the mines under the proviso for re-entry, and in June, 1829, the whole of the premises were delivered to her by the sheriff of Denbighshire under a writ of possession; and she continued to work one of the mines. In November, 1829, the engines, machinery, and implements, which still remained on the premises, were seized under an alias fieri facias issued upon a judgment at the suit of the assignees of Messrs. Corser, Naylor, & Co., bankers at Whitchurch, Shropshire, against Edward Youde and his sister Julia Youde, for a debt of upwards of 800*l.* due on certain promissory notes: and on the 9th November, they were sold to satisfy this execution. On the 3rd October, 1835, the present action was commenced by the plaintiffs as the trustees of Mrs. Whalley, (to whom no payment had ever been made on account of the annuity), against the defendant, who was the sheriff of Denbighshire at the time of the above seizure and sale, to recover the value of the engines, machinery, &c. so sold. The warrant under which the officer levied was not produced, nor was any notice given to the defendant to produce it. The writ of fieri facias was produced by the defendant, but no memorandum or indorsement of the officer's name appeared

upon it. The officer, John Wild, was called, and stated that he made the levy, and should not have done so without a warrant; that the custom at that time was for the officers to deliver such warrants to the auctioneer who sold the goods; in order that they might be transmitted to the excise office together with the auction sheet: that he had searched among his papers, and had inquired at the under-sheriff's office, but could not find the warrant. He stated also that he had put his son into possession after the levy was made, and, as he believed, gave him the warrant. The son, being also called, said that his father put him into possession, and gave him the warrant; and that he believed he returned it either to his father or to the sheriff's office. The plaintiffs then called the widow and executrix of the auctioneer, who proved that she had searched her husband's papers for the warrant without finding it; and also a clerk from the head excise office in London, who produced from the office the auction sheet of this sale, and said that no warrant was attached to it, and that the excise laws did not require the warrants to be transmitted to the office. He stated, however, on cross-examination, that the auction sheets were forwarded through the supervisor of excise for the district, who sent up at one time the auction sheets of many sales; that all those so sent up together were kept in the same envelope; that in the envelope in which this was found there were many others, to none of which warrants were annexed; and that he had not searched beyond that envelope. The supervisor was not called, nor was any search proved among his papers. It was objected for the defendant, that this evidence was not sufficient to let in secondary proof of the warrant; the learned judge however ruled that it was, but gave the defendant leave to move to enter a nonsuit, if the court should be of a different opinion. The authority of the defendant for the seizure under the fieri facias was accordingly proved by

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the bailiff; and the value of the engines, machinery, and implements sold being estimated by consent at 1000*l.*, and that of the steam engines and other fixed machinery at 760*l.*, a verdict was taken for the plaintiffs for the former sum, subject to a motion for a nonsuit on the point before stated, and also on the ground that the transfer of the machinery, &c. by the annuity deed was void for want of a change of possession;—or to reduce the damages by the latter sum, on the grounds that by the possession taken under the ejectment the engines reverted in Mrs. Youde, the lessor, and also that trover could not be maintained for such engines.

In Michaelmas term, *Cresswell* moved pursuant to the leave reserved, and obtained a rule on all the above points, excepting that as to the invalidity of the annuity deed; the Court observing that the case was very different from that of an omission to take possession under a deed contemplating an *immediate* change of possession. Here the deed contemplated that Edward Youde should continue in possession until default, and it was the mere omission of the trustees to take possession *after default*.

Jervis and *Mathew* now shewed cause against the rule. —First, there was sufficient proof of search for the warrant to let in secondary evidence, in order to connect the sheriff with the bailiff. The warrant is an instrument which the bailiff ought to keep for his own protection, and which the sheriff is not the proper party to have the custody of. *Rex v. Stourbridge* (a) was a stronger case than the present. There it appeared that an indenture of apprenticeship had been given to the wife of a market gardener, to take it to the overseers of the parish by which the apprentice was bound out; that the market

(a) 8 B. & Cr. 96; 2 Man. & R. 43.

gardener and his wife were both dead, the wife having been the survivor; and it was held that a search for the indenture in the parish chest, in which it was the overseer's duty, if it came into his hands, to deposit it, was of itself sufficient to let in secondary evidence of the contents. That case directly meets the observation which will probably be made on the other side, that a search ought to have been made for the warrant among the *supervisor's* papers. But as it was his duty, if it came into his possession, to transmit it to the excise-office, it will be presumed either that he did so, or that it had been lost. But further, the warrant having done its office, so that it was no longer of consequence to preserve it, much less evidence is sufficient to raise a presumption of its loss, than would otherwise be necessary. *Brewster v. Sewell* (a), *Freeman v. Ashell* (b), *Kensington v. Inglis* (c). [The Court here intimated that they might proceed to the other points].

2ndly. It must be admitted that trover cannot be maintained for articles which are strictly *fixtures*. But it is submitted that these engines are not so, but are rather to be considered as mere *annexations* to the freehold; or at all events, that they are such fixtures as are privileged for the purposes of trade, and were removable and assignable by the lessee. There seems, moreover, to be a distinction between those fixtures which a tenant voluntarily surrenders to the landlord at the expiration of his term, and those which the landlord takes by a compulsory entry. In *Lyde v. Russell* (d), the Court acted upon the doctrine that on the expiration of the term fixtures put up by the tenant become a *gift* in law to the reversioner. That principle cannot be applied to the case where the reversioner takes compulsory possession of them. So also, where the tenancy is determined by death, fixtures erected during

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(a) 3 B. & Ald. 296.

(c) 8 East, 273.

(b) 2 B. & Cr. 494; 3 Dowl.

(d) 1 B. & Ald. 394.

& R. 669.

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the term will not go to the landlord. In *Davis v. Jones* (a), certain parts of a machine put up by the tenant during his term, which were capable of being removed without injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant, were held to be the goods and chattels of the outgoing tenant, for which he might maintain trover. The relaxation of the old strict rule as to fixtures is much greater as between landlord and tenant than as between heir and executor; *Lawton v. Lawton* (b); *Lord Dudley v. Lord Ward* (c). [*Parke, B.*—One question is, whether, in strict law, the plaintiffs, who represent Edward Youde, the lessee, could derive from him any greater right than to remove the fixtures during the term, or while they continued in possession after it expired? Even supposing these engines, therefore, to be the subject of an action of trover, can the *plaintiffs* maintain trover for them?] The plea alleges that they are not the plaintiffs' goods for any purposes: the sheriff, at all events, has no right to say that as against the plaintiffs. The rule of law established by the modern cases is, that the lessee has a right to remove articles *annexed* to the freehold, which are removeable without injury to the freehold: *Penton v. Robart* (d); *Elwes v. Maw* (e); *Trappes v. Harter* (f); and for such annexations trover may be maintained. [*Parke, B.*—Some doubt has been thrown on *Trappes v. Harter*, as far as it bears upon this point].

Cresswell, Tyrwhitt, and Welsby, in support of the rule.—First, no sufficient search for the warrant was proved, so as to let in secondary evidence. A warrant of seizure by no means becomes, as has been said, a use-

(a) 2 B. & Ald. 165.

(b) 3 Atk. 13.

(c) Amb. 13.

(d) 2 East, 89.

(e) 3 East, 38.

(f) 2 C. & M. 153; 3 Tyr. 604.

less document after the execution has been levied: it is frequently needed for the protection of the officer or of the sheriff. Here there was no notice to the defendant to produce the warrant, nor any *search* proved at the office, so as to supply the place of such notice. There is no satisfactory proof that it was delivered to the auctioneer; if it was not, Wild the son retained it, and no search is proved among his papers; and if it was, the presumption is that the auctioneer delivered it to the supervisor, through whom the papers were transmitted to the excise-office: and as it appears that this document had not found its way to the excise-office, the supervisor ought to have been called to state what had become of it, or evidence should have been given of a search among his papers. The rule is, that such proof must be adduced as shall reasonably satisfy the Court that the document is lost; and it was quite as *reasonable* that the plaintiffs should supply *this* link in the chain of proof as to the transmission of the warrant, as those which were supplied by the searches at the auctioneer's and at the excise-office. All the cases lay down, that in the absence of notice to the sheriff to produce the warrant, its non-production ought to be accounted for by clear and satisfactory evidence. *Drake v. Sykes* (a), *Martin v. Bell* (b), *Hill v. Sheriff of Middlesex* (c), *Taplin v. Atty* (d).

Secondly, the whole engines being affixed to the freehold, are not the less fixtures, because *parts* of them may be removed without damage to the freehold itself. The removal even of those parts would prevent the engines from working, and so be an injury to the freehold. Nor is there any distinction between the case where the term expires by effluxion of time, and where it is determined by forfeiture; *Storer v. Hunter* (e). It is not, in such case,

(a) 7 T. R. 113.

(b) 1 Stark. Rep. 413.

(c) Holt's N. P. C. 217; 7 Taunt. 8.

(d) 3 Bing. 164; 10 Moore, 564.

(e) 3 B. & Cr. 368; 5 Dowl. & R. 240.

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determined by the act of the landlord, but by the wilful default of the tenant. If the fixtures are to be considered as reverting to the landlord by the *gift* of the tenant, it would follow that the tenant's declaration that he did not intend to give them to the landlord might defeat such gift. *Alderson*, B.—Is it not a presumption of *law* that he gives them to the landlord, unless he removes them during the term? It is by no means certain that the lessee had the right to remove these engines at all; but if he had, that right was clearly co-existent only with his tenancy.

But, at all events, they cannot be recovered in *trover*. *Lee v. Risdon* (a), *Coombs v. Beaumont* (b), *Hallen v. Runder* (c), *Boydell v. M'Michael* (d). The authority of *Trappes v. Harter*, which is the only case apparently in favour of the plaintiffs on this point, has been much shaken by the two latter cases.

PARKE, B.—I think the rule should be discharged as to entering a nonsuit, but that it must be made absolute for reducing the damages to the value of the moveable articles. The first point is, whether reasonable diligence was used to find the warrant, so as to raise a presumption of its loss: that is a question for the Court to decide. *Primâ facie*, the warrant ought to be produced as the authority under which the seizure is made; if it be not produced, due diligence must be shewn to have been used to find it. I think in this case due diligence was used. The officer receives the warrant from the sheriff, and ought to keep it for his own protection; he is not necessarily to leave it in the possession of the sheriff. Here the officer is called, and he has it not; and on his evidence, I think the sheriff's office is excluded; for he says he inquired there for it in vain. According to his evidence, it comes into the hands of

(a) 7 Taunt. 191.

(b) 5 B. & Ad 72; 2 N. & M. 235.

(c) 1 C. M. & R. 266.

(d) *Ibid.* 177.

the auctioneer: the son's statement, however, is that it was delivered to him; but he does not produce it, and it may reasonably be presumed that it was returned by him to his father. That brings it back to the hands of the auctioneer, whose business it was to transmit it through the supervisor to the Excise-office. We must conclude that the supervisor did his duty, and sent up all the papers delivered to him; nor is it a document which he would be likely to keep. The reasonable presumption is, therefore, that it was lost by the sheriff's officer or the auctioneer.

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Then, as to the other point, we must take these engines, on the report of the learned Judge, to have been in part affixed in a substantial manner to the freehold, in the ordinary way in which steam-engines are erected; and the law is clearly settled by the cases of *Lee v. Risdon*, and *Hallen v. Runder*, that every thing substantially and permanently affixed to the soil is in law a *fixture*. The principle of law is, that "*quicquid solo plantatur solo cedit*." The right of a tenant is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures. That right of the tenant enables the sheriff to take them under a writ, for the benefit of the tenant's creditor. I assent to the doctrine laid down in *Coombs v. Beaumont* and *Boydell v. M'Michael*, that such fixtures are not goods and chattels within the bankrupt law, though they are goods and chattels when made such by the tenant's severance, or for the benefit of execution creditors. The old law, as laid down by Lord Holt in *Poole's* case (a), cited in *Lyde v. Russell* and *Penton v. Robart*, was as I have stated. These engines, therefore, were never goods and chattels at all, so as to pass to the plaintiffs. They had only the same right of removal as the tenant, which certainly ceased in June 1829: and that right of removal would not have enabled *him* to sue in trover for them,

(a) 1 Salk. 368.

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even during his term. The judgment in *Davis v. Jones* proceeded entirely on the ground that the *jibs*, which were the subject of the action, were not fixtures at all, but mere personal chattels. Here there is no doubt that the steam-engines were left affixed to the freehold after the expiration of the term, and after the plaintiffs had any right to consider themselves tenants; and I am of opinion that trover is not maintainable for them.

BOLLAND, B.—I am of the same opinion. As to the first point, I think there was sufficient evidence of search for the warrant to let in secondary evidence. As to the other point, there is no doubt that these steam-engines are found to have been fixed to the freehold. I do not go the whole length of saying that there may not be engines of this kind such as to entitle the tenant to remove them; there are cases in which it can be done without any injury to the freehold at all. But whether the tenant here had a right to remove them or not, the present question is put an end to by the case of *Lee v. Risdon*; he *did not* remove them during his term, and his right was then determined.

ALDERSON, B.—I am clearly of the same opinion on both points. Fixtures cannot become goods and chattels until the tenant has exercised his right of making them so, which he can only exercise during his possession. The moment that expires he cannot remove them; and trover cannot, therefore, be maintained for them. Lord Holt (*a*) expressly puts the tenant's power to remove erections put up for carrying on trade, on the ground of its being a power coupled with an interest.

Rule absolute to reduce the damages.

(a) 1 Salk. 168.

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NORTON v. ELLAM.

ASSUMPSIT on a promissory note, payable on demand, with lawful interest. Plea, that the cause of action did not accrue within six years.

On a note payable with interest on demand, the Statute of Limitations begins to run from the date of the note.

At the trial before Lord *Abinger*, C. B., at the Middlesex sittings after last Michaelmas term, the note given in evidence was in the following form:—"I promise to pay 400*l.* on demand, with lawful interest." The question was, whether the statute ran from the date of the note, or from the time of the demand. A verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that the statute began to run from the date of the note, there having been a demand within six years after the date of the note, but no subsequent promise to pay. *Butt* having in Hilary Term last obtained a rule accordingly,

Petersdorff now shewed cause.—When a note is payable on demand, a demand is necessary before the statute can begin to run. In the old editions of Selwyn's N. P. a case is quoted, *Christie v. Fonsick*, in which it is stated to have been held that a note payable on demand is payable immediately, and that the Statute of Limitations runs from the date; but, in a subsequent edition (the 7th), p. 334, it is said: "With respect to promissory notes payable on demand, the statute runs not from the date of the note, but from the time of the demand;" and a "late case in B. R., overruling *Christie v. Fonsick*," is referred to. A strong argument arises from the circumstance of its being made payable with interest, as it shews that the parties intended some time to elapse before a demand. In *Rumball v. Ball* (a), it was certainly held that in debt on a note pay-

(a) 10 Mod. 38.

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able on demand, it is not necessary to allege a demand in the declaration; because the bringing the action was a demand; but that was in an action by bill. That is now altered, the writ of summons being made in all cases the commencement of the action. To say that the statute runs from the date of a note payable on demand, would be to say that there is a breach of contract the moment the note is written: but there can be no such thing as this in law or reason, that a breach of an obligation can exist at the instant of its creation;—some interval must be allowed; but even if it is possible to say that there is a breach of contract immediately, in an ordinary case, it cannot be so where a security is payable with interest, since that shews that some time must intervene before the money is payable. In *Barrough v. White* (a), where, in an action by the indorsee against the maker of a promissory note, payable with interest on demand, the plaintiff having proved that he gave value for it, the defendant tendered evidence of declarations made by the payee when the note was in his possession, that he, the payee, gave no consideration for it to the maker; it was held that such evidence was inadmissible, as the plaintiff could not be identified with the payee, and the note could not be treated as overdue at the time of the indorsement: and *Bayley, J.*, in delivering his judgment, puts a case which applies to the present. “It is said that in *Banks v. Colwell, Buller, J.*, treated a note payable on demand as a note taken by an indorsee after it was due; we are not, however, acquainted with all the circumstances of that case; *payment might have been demanded before the indorsement*, and, indeed, it is stated that several payments had been made on account.” So that he seems to have considered that there would be no breach until a demand had been made. In *Homes v. Kerrison* (b), it was held that on a bill payable after sight no debt accrues until

(a) 4 B. & Cr. 325.

(b) 2 Taunt. 323.

it is presented for payment, and that the statute was therefore no bar unless it had been presented for payment six years before the action commenced. [*Alderson*, B.—Do not the cases, which have decided that the bringing the action is a demand, shew that there has been a previous breach?] If the time is to be calculated from the date, there could be no plea of tender when the bill is payable on demand. [*Parke*, B.—Yes, just as much as there can be a plea of tender to goods sold and delivered, payable for on request; a tender of the amount of the note with interest *de die in diem*, at any time, would be a good plea. The contract on the note is in a state of being broken perpetually, if the party does not pay it]. If the law be so, this difficulty arises, that a breach of contract would be admitted upon the record, giving a right to damages beyond the amount of the note; or if more were tendered than the amount of the note, then a breach of contract is confessed, and the tender would be unavailable. The difficulty is, that where a note is made payable on demand, with interest, the parties contemplate that some interval shall elapse before the money is required to be paid; that is, that some interest should have accrued due. Principal *and* interest *were stipulated* to be paid: to hold that the note was due from the date, would be to vary the terms of the contract, and *exclude* the right not to be sued till some interest had *become payable*. The question in all cases of this kind is, what were the objects of the contracting parties? can the Court say, on looking at this document, that immediate payment was contemplated, and not a loan for some interval, however short? The note was payable either at the moment when given, or after demand. It could not be payable at the moment when given, because the contingency of accruing interest had not and could not have happened; if payable after demand, then the plaintiff obtains leave to sue. The case of goods sold, or money lent, is not analogous, because there there is

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nothing to negative the idea of *immediate* liability to pay. The creation of the debt and the corresponding duty of discharging it are co-existent and strictly contemporaneous.

Butt, contra, referred to Selw. N. P., 8th edition, 352, where it is said: "The statute runs from the date of the note, and not from the time of the demand."

PARKE, B.—I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*. It is quite different from the case of a note payable at sight, because there, by the terms of the contract, it must be shewn before the action is brought.

ALDERSON, B.—I am of the same opinion. It must be so unless there is something to shew that a demand is to be a collateral matter.

Rule absolute to enter a nonsuit.

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CANNAN and Others, Assignees of HEALEY, a Bankrupt,
v. WOOD and Another.

TROVER to recover the value of certain silks, the property of the plaintiff. Plea—that the silks were not the property of the plaintiff.

A delivery of goods, *bonâ fide* made in part payment of a previous debt, after a secret act of bankruptcy committed by the debtor, is a payment protected by the 82nd section of 6 Geo. 4, c. 16.

At the trial before Lord *Abinger*, C. B., at the London Sittings after last Michaelmas Term, it appeared that the plaintiffs were the assignees of Healey, the bankrupt, who had been a dealer in laces and fringes, and that the defendants were lace-merchants, living at Manchester. The action was brought to recover the sum of 35*l.*, being the value of two parcels of goods (principally fringes and silks, part made up, and part in an unmanufactured state), given by the bankrupt to the defendants, under the following circumstances:—The bankrupt being indebted to the defendants, the latter made repeated applications for payment; in consequence of which pressure the bankrupt, on the 11th and 12th of June, 1835, delivered to the defendants two parcels of goods, in part payment of the debt, and a few days afterwards a cognovit was given for the residue. The fringes were such as the bankrupt sold in his trade, and the unmanufactured silks such as he required for his business, but both were articles of a description not required by the defendants for their business or otherwise, and would not have been taken if money could have been obtained from the bankrupt. The bankrupt had previously committed a secret act of bankruptcy, and a fiat was subsequently issued against him on the 29th of June. The learned Judge left it to the jury to say, whether this was a payment in the due course of trade, which they found it was not, and the plaintiff obtained a verdict; the learned Judge giving the defendants leave to move to enter a nonsuit, if the Court should be of opinion that this was a payment protected by the 82nd

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section of the 6 Geo. 4, c. 16. In Hilary Term last *Erle* obtained a rule accordingly, against which

Channell now shewed cause. The question is, whether this is a payment which is protected by the 82nd section of the Bankrupt Act, 6 Geo. 4, c. 16? It must be observed, that as the plaintiffs' title accrued from the act of bankruptcy, and as these goods were theirs by ordinary operation of law, it is incumbent on the defendants to bring themselves within the 82nd section, and to shew that this was strictly a payment within the meaning of that section. It enacts, "That all payments really and bonâ fide made, or which hereafter shall be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." Now it is clear that every transfer of goods does not operate as a payment. A delivery of goods to a creditor cannot be considered as payment unless they are delivered in the ordinary course of trade; and here the jury have expressly found that the goods in question were not delivered in the ordinary course of trade. In *Carter v. Breton* (a), where, after a secret act of bankruptcy by P., the defendant accepted a bill of exchange for him for 98*l.*, at three months, which P. paid to a creditor standing by; and later in the course of the same day P. agreed to sell the defendant four horses, as a security for 70*l.* of the 98*l.*, and they were accordingly delivered to the defendant, who paid the bill when it became due; it was held, that the transaction was not protected by the 82nd section of the act. There the question had gone to the jury, and they had found that there was a bonâ fide sale of the horses, and given a verdict for the defendant. It is not

(a) 6 Bing. 617.

intended to say that that case is precisely similar to and decisive of the present; but the Court, in giving judgment, assume a certain state of facts similar to the present, and give their judgment thereupon. *Tindal*, C. J., at the conclusion of his judgment, says: "Treating, therefore, the acceptance by the defendant, which was afterwards honoured, as an actual advance of money, which is the most favourable way of considering it for the defendant, the transaction amounts to no more than a set-off of the price of the horses against a by-gone debt; which set-off is agreed upon after a secret act of bankruptcy; and we do not think this can, in any point of view, be considered a payment within the 82nd section of the act. [*Alderson*, B.—In that case, the horses were handed over as a security to be delivered back if the debt were paid. How could that be a payment? If a delivery of goods is such as amounts only to a subject of set-off, it cannot be pleaded as a payment, and that constitutes the distinction; but if they are delivered under such circumstances as that you can *plead* payment, why should it not be a payment within the meaning of the act? As for instance, if a party delivers goods as for a particular amount, together with the balance in money, then they would clearly be delivered as a payment pro tanto. Whether they were so delivered would be a question for the jury]. Then the jury have here determined that question, as they have found it was not a payment in the ordinary course of trade. [*Parke*, B.—The expression, "the ordinary course of trade," has crept in by mistake. It is used in the 19 Geo. 2, c. 32, but is omitted in the 46 Geo. 3, c. 135, which statute uses the words "bonâ fide" only. It is also omitted in the recent statute, where the words are "really and bonâ fide." The finding of the jury that this was not a payment made in the ordinary course of trade, is only important as far as that might induce them to believe that it was not made truly and bonâ fide].

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In *Wards v. Clarke (a)*, where the bankrupt, after a secret act of bankruptcy, bought on credit and sold for ready money at unduly low prices, Lord *Tenterden* held that the purchasers were not protected by 6 Geo. 4, c. 16, s. 82, unless the purchase was in the usual course of business. Here the fact, whether it was in the ordinary course of trade, was left to the jury, and they found it was not. [*Parke, B.*—It is quite clear that this was to be a payment, because the witness proved it was to be so; he said they were given in part payment. Lord *Abinger, C. B.*—The goods were to be sent in part payment. It might not be in the due course of trade, because he disposed of some goods such as he did not usually sell—some which were not made up: yet still it might be *bonâ fide*. *Alderson, B.*—The case of *Ward v. Clarke* was not the case of a fair transaction.]

Erle and *Saunders*, *contrâ*, were stopped by the Court.

Lord *ABINGER, C. B.*—I was induced to reserve this point, because I thought the section was to be construed in the same manner as those contained in the old acts. I thought the point ought to be reserved for the consideration of the Court, expressing it as the inclination of my opinion, however, at *Nisi Prius*, that it was not a payment within this statute. I reserved it without giving any definite opinion at the time.

According to the 6th Geo. 4, c. 16, and the 46th Geo. 3, c. 135, it is clear that those acts made it a valid payment if made by a bankrupt more than two months before the suing out of the commission. The modern Act of Parliament of the 6 Geo. 4, adopts the language of Sir Samuel Romilly's act, and makes it a valid payment, if made *bonâ fide* more than two months before the suing out of the commission, though after a prior act of bankruptcy. The last statute has been altered in some degree from the former, but I think it must be construed in the same manner; and

(a) Moo. & Malk. 497.

the question is, whether this was bonâ fide a payment. I cannot say it was not bonâ fide, looking at the circumstances attending this transaction. It did not appear that there was any fraud on the part of the creditor, or that he had any knowledge of the act of bankruptcy, and these goods were delivered by the debtor, alleging that he could not raise the money, but was willing to pay part in goods, if the other would receive it, which he did, intending to take the remainder at a future period; and the question is, whether, under these circumstances, what was done was bonâ fide done. We cannot suppose the debtor did not mean it as part payment, or that the creditor did not mean to take it as part payment; it is, therefore, within the act, and the rule ought to be absolute for a nonsuit.

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PARKE, B.—I am of opinion, upon all the facts of this case, that the rule ought to be absolute for entering a nonsuit. It appears to me, after reading the learned Judge's report, and hearing the arguments of counsel, that the question is reduced to this: whether a payment in goods is a payment within the provisions and meaning of the eighty-second section; and I think it clearly is, and ought to be so considered. There are no words which say it shall be a payment in money; it may be in money or money's worth; the case, however, does not rest only on that, for we have the authority of Lord *Kenyon*, in the case of *Wilkins v. Casey* (a) for saying that a payment in goods is a payment within the statute 1 Jac. 1, c. 15, s. 14; and the question being reduced to this, it is clear on the evidence that these goods were delivered in the way of payment; so that they never could have been made the subject of an action for goods sold and delivered on the part of the bankrupt, because the parties applied for *payment* to the bankrupt, and agreed it was to be taken in goods. Then, as to the question of its being really and bonâ fide made, and not being a fraudulent preference of some particular creditor, which

(a) 7 T. R. 713.

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would be requisite in order to invalidate the transaction, it seems to me that question really does not arise on the evidence; and if it had, my lord's attention ought to have been called to it, and he should have been asked to leave that question to the jury; but it appears to me there is no ground for saying on this evidence that it was not really intended to be a payment, and that it was not bonâ fide made, and there is no pretence for saying it was a fraudulent preference of one particular creditor. With respect to the question that was left to the jury, it seems to me not a question at all to be left to the jury, for it is no longer necessary, in order to protect the payment, that it should be made in the ordinary course of trade, as it was necessary under the 19th Geo. 2. These words were dropped in Sir Samuel Romilly's Act, and in this statute are altogether omitted: so that that question was unnecessarily left to the jury. It could only be important as assisting the jury to determine as to the bona fides of the transaction, but is by no means a conclusive test. I think the rule ought to be made absolute.

BOLLAND, B.—I am of the same opinion. I have no doubt in this case: an equivalent is given for the debt, and the question is, whether its being in goods amounts to a payment within the statute. Lord *Kenyon* seems to have thought there was no doubt upon the subject, and I see no reason why a payment in goods may not be as good as a payment in money. Then the only question is, whether there is any thing to impeach the case, from the mode in which the transaction was carried on. Here is an application made on behalf of a person who brought an action against the debtor; and, from the circumstances in which they were placed, he naturally wished to get the money as soon, and at as little expense to himself, as he could; and he agreed, therefore, to take a part of the debt in goods, and to take a cognovit for the rest. It seems to me the question is altogether one way;

and as to the bona fides, I think nothing whatever appears to impeach it.

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ALDERSON, B.—I am of the same opinion; it seems to me this was a payment legally and bonâ fide made. Whether it was legally made would depend upon this,—whether the goods were delivered and taken under such circumstances as, in point of law, would amount to a payment of the debt, so that a party could have pleaded it as a payment; if it could only be pleaded as a set-off, that would not be sufficient. But if it is to be taken as a part payment, and that part of the debt is therefore wiped off, then it was pleadable as a payment. That appears to be the real criterion to be applied to the case in the Court of Common Pleas. Then, as regards the question of its being a bonâ fide transaction, it appears to me that there is no pretence for saying it is an unfair transaction.

PARKE, B.—The bankrupt never could have maintained any action for goods sold and delivered in this case.

Rule absolute.

PERRY and Others v. SKINNER.

CASE for the infringement of a patent for an improvement in pens, of which the plaintiffs were assignees. The declaration stated that, after the assignment to the plaintiffs, and after the passing of a certain act of Parliament, intitled “An Act to amend the Laws touching Letters Patent for Inventions,” to wit, on the 30th April, 1836, the plaintiffs, by and with the leave of Sir Robert Mounsey Rolfe, Knt., then being his Majesty’s Solicitor-General, first had and duly certified by his fiat and signature in that behalf, entered with the clerk of the patents a certain disclaimer and memorandum of alteration, in writing, of part of the specification, (the same not being

Where a patent is originally void, but amended under 5 & 6 Will. 4, c. 83, by filing a disclaimer of part of the invention, that act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer.

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such disclaimer or alteration as extended the exclusive right granted by the letters patent), by which disclaimer and memorandum of alteration, the same being under the hands and seals of the plaintiffs, they did disclaim as follows, (setting forth the particular part of the specification disclaimed, and the alteration in the claiming clause, necessary to make it consistent with the previously mentioned part of the specification), which said disclaimer and memorandum of alteration afterwards were filed by the said clerk of the patents, and duly enrolled with the said specification, pursuant to the statute. The declaration then alleged, that the defendant, within the term of fourteen years, to wit, on the 20th of February, 1836, and on divers other days, &c., did counterfeit the said invention, and did use and practise the same otherwise than in relation to the said part of the invention so disclaimed, in breach, &c.

Plea, as to so many of the supposed grievances as were committed before the 30th of April, 1836, *actionem non*, because the said disclaimer, &c. was not entered or enrolled until the 30th of April, 1836, as aforesaid, and until after the committing of the grievances in the introductory part of the plea mentioned, and that the said invention, for which the said letters patent were originally granted, was not at the time of making and granting the said letters patent a new invention; but, on the contrary thereof, had been, as to a material part thereof, publicly and generally practised, used, and vended, before the date of the letters patent, by reason whereof the rights &c. granted by the patent were void; wherefore the defendant, at the said several times, when &c., before the said 30th of April, 1836, and whilst the said rights &c. were so void &c., committed the said several supposed grievances, as he lawfully might.

Replication—That the said last-mentioned grievances were respectively committed only with relation to, and in respect of, those parts of the said invention, to which the

said disclaimer and memorandum had no reference, and did not apply; and that the said last-mentioned parts of the said invention were, at the time of making and granting the said letters patent, a new invention.

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Special demurrer and joinder.—The point stated for argument in the margin of the demurrer book, on the part of the defendant, was as follows:—The defendant means to contend, that the patent was, and by the replication is admitted to have been, void at the time of the alleged infringement, to which the plea is pleaded; and therefore such infringement was lawful when it took place, and cannot be rendered otherwise by a subsequent disclaimer, even as to those parts of the patent which are not disclaimed or altered.

Wightman, in support of the demurrer.—The question is, whether, supposing the patent to have been originally void, but afterwards amended under the recent Act, 5 & 6 Will. 4, c. 83, a party can be made liable by relation for an infringement committed in the meantime, before the amendment has been made. The question turns on the construction of the first section of that statute, which, after providing that any person having obtained letters patent for any invention, may enter a disclaimer of any part of either the title of the invention or of the specification, or a memorandum of any alteration therein, enacts that “such disclaimer or memorandum of alteration being filed by the clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification, in all courts whatever.” By the old law, before the passing of this statute, where the specification was too large, the patent was held to be wholly void: *Rex v. Else* (a), *Campion v. Benyon* (b). The declaration here describes the disclaimer and memorandum of alteration as having been made on the 30th of

(a) 11 East, 109, note.

(b) 3 Brod. & Bing. 5.

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April, 1836. The plea states that the disclaimer was not enrolled until the 30th April, and not until after the infringement had taken place, and that the invention was not a new invention, but, as to a material part, an old invention, by reason whereof the patent was void. It is admitted by the replication that every thing that was wrongfully done by the defendant was before the disclaimer, but it is alleged that parts of the invention so infringed were new. Apart from the recent statute, the defendants would have a good defence, as the patent would be wholly void. And that statute has no retrospective operation. It says, that such disclaimer being filed and enrolled, it shall be deemed to be part of the specification. [*Alderson, B.*—Part of the specification—it does not say of the *original* specification]. Then there is a proviso “that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding in *scire facias*) pending at the time when such disclaimer or alteration was enrolled, but in every such action or suit the original title and specification alone shall be given in evidence.” But there are no words in the act making parties wrong-doers by relation; the disclaimer is only to operate from the date of its filing and enrolment. [*Alderson, B.*—Then what is the use of the proviso?] It may have been introduced *ex majori cautela*, to meet the case where a period has intervened between the obtaining of a fiat for the alteration and the enrolment, in which there may have been an action brought. Admitting that some doubt may arise on the construction of the proviso, the Court will not, without express and decisive words, put such a construction upon the clause as would render innocent parties wrong-doers by relation. If such a construction were put upon it, it might be an inducement to a person taking out a patent to put into his specification a great deal more than he was entitled to; and then, without any risk, by means of a subsequent disclaimer, give validity to his patent, and recover against all

who had infringed it in the mean time; and it would be impossible to take advantage of its invalidity.

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Rotch, contra.—The act has a retrospective operation, where the infringement takes place with respect to a part of the invention to which the disclaimer does not apply. If the words of the statute mean that the disclaimer becomes part of the specification “from thenceforth,” the effect of that would be to give virtually a new patent, which the statute never intended. The statute intends that the disclaimer shall take effect from the date of the letters patent. The language of the proviso, that the disclaimer or alteration shall not be receivable in evidence, in any action pending at the time of enrolment, is confirmatory of that view of its meaning.

Lord ABINGER, C. B.—It cannot be doubted that the act of Parliament is obscurely worded, and we are now called upon to put an interpretation upon it. The act would be unjust if it made a man who was acting consistently with the law at a certain time, subsequently a wrong-doer by relation. We never can presume that such was the intention of the legislature, and we are not at liberty to construe a doubtful act by any such presumption. The only argument that can be offered is upon the proviso, which says “that no disclaimer shall be receivable in any action or suit pending at the time when such disclaimer was enrolled.” We consider the sound way of interpreting that is, that it shews the legislature did not intend to make a person a wrong-doer by relation; because it did not presume that any man would have the courage to bring an action, after he had actually disclaimed, for an infringement of a patent long before such disclaimer was thought of. The intention of the legislature doubtless was, that he should not have the benefit of the disclaimer as to infringements gone by long

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before such disclaimer was made. The act of Parliament is not specific on this point; but we think it never could have been the intention of the legislature to make persons wrong-doers by relation. The judgment of the Court, therefore, will be for the defendant.

PARKE, B.—I am of the same opinion. The act of Parliament certainly is not very clearly worded, and it might seem, at first, that the construction to be put upon the words of it would be in favour of Mr. *Rotch's* view of the case. The act enables any party to disclaim "any part of either the title of the invention, or of the specification, stating the reason for such disclaimer, or, with such leave as aforesaid, to enter a memorandum of any alteration in the said title or specification, not being such disclaimer, or such alteration as shall extend the exclusive right granted by the said letters patent, and such disclaimer or memorandum of alteration, being filed by the said clerk of the patents, and enrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all courts whatever." The construction Mr. *Rotch* contends for is, that it shall be deemed and taken for part of the letters patent as originally enrolled. The rule by which we are to be guided in construing acts of Parliament is to look at the precise words, and to construe them in their ordinary sense, unless it would lead to any absurdity or manifest injustice; and if it should, so to vary and modify them as to avoid that which it certainly could not have been the intention of the legislature should be done. Now, if the construction contended for by Mr. *Rotch* was to be considered as the right construction, it would lead to the manifest injustice of a party who might have put himself to great expense in the making of machines or engines, the subject of the grant of a patent, on the faith of that patent being void, being made a wrong-doer by relation.

That is an effect the law will not give to any act of Parliament, unless the words are manifest and plain. We must engraft, therefore, a modification upon the words of the act in this case for the purposes of its construction, and read it as though it had been, "shall be deemed and taken as part of the said letters patent &c. from thenceforth," so as not to make the defendant a wrong-doer. The only doubt arising in this case is from the words of the proviso; but we cannot think the legislature meant to do so unjust a thing as to restrict a party from doing that which he has a lawful right to do; and therefore, though there is some obscurity in the words of the act, we are bound to put a reasonable construction upon them; and undoubtedly the effect of it is to make the patent good for the future.

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BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the defendant.

COHEN v. HUSKISSON.

TRESPASS. The first count was for assaulting the plaintiff, and compelling him to go to a station-house, and

In trespass for assault and false imprisonment, the defendant

pleaded that he was possessed of a shop, and carried on the business of a baker therein, and that the plaintiff had been in the shop making a great noise and disturbance, and abused the defendant, and disturbed him in the peaceable possession of his shop, *in breach of the king's peace*, and thereby obstructed the defendant in the exercise of his business; that the plaintiff went out of the shop into the public street in front of it, and continued there to make a great noise and disturbance, and to abuse the defendant, and thereby caused a great concourse of persons to assemble, and so disturbed the defendant in the possession of his shop, and obstructed his business, *in breach of the peace*, and thereby caused a great riot and disturbance; that the defendant requested him to desist and depart, but he refused, whereupon the defendant, *in order to preserve the peace*, sent for certain policemen, and requested them to remove the plaintiff; that they requested the plaintiff to cease making such noise and disturbance, &c., but he refused, and continued making such noise, riot, and disturbance, &c.; whereupon the defendant, in order to preserve the peace, charged them with the plaintiff, and he was taken to a station-house, and thence before a magistrate, who admonished and discharged him:—*Held*, that, even without the allegation of a riot, the plea disclosed a sufficient justification.

The evidence was, that the plaintiff, after abusing the defendant in his shop, went into the street outside, and there continued to abuse him; that a crowd of a hundred persons was collected, and the street much obstructed; that the defendant sent for the police, who, on the plaintiff's refusing to go away, took him to the station-house, and before the magistrate, as stated in the plea:—*Held*, that these facts amounted to a breach of the peace, and justified the defendant in directing the imprisonment.

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thence to the Lambeth-street police-office, and imprisoning him at those places. The second count was for a similar assault and imprisonment of the plaintiff's wife.

Pleas, first, not guilty; secondly, as to the first count, that before and at the time when, &c., in that count mentioned, the defendant was lawfully possessed of a certain dwelling-house and shop, situate in the parish of St. Mary, Whitechapel, in the county of Middlesex, in which he exercised and carried on the trade and business of a baker; and the defendant being so possessed thereof, the plaintiff, just before the said time when, &c., had been and was in the shop of the defendant, making a great noise and disturbance therein, and there insulted and abused the defendant, and greatly disturbed and disquieted him and his family in the peaceable and quiet possession thereof, *in breach of the peace of our Lord the King*, and thereby hindered and obstructed the defendant in the lawful exercise and carrying on of his business in his said shop; and the plaintiff, just before, &c., had departed from and out of the said shop of the defendant into the public street there, in front of the said dwelling-house and shop of the defendant, and there continued to make a great noise and disturbance, and to insult and abuse the defendant, and caused a large concourse and mob of persons then passing and repassing along the said street to assemble, and remain and continue opposite to the said dwelling-house and shop of the defendant, and thereby greatly disturbed the defendant in possession and occupation of his said shop, and hindered and obstructed him in the lawful exercise and carrying on of his said business therein, *in breach of the peace of our said Lord the King*, and caused and created a great riot and disturbance in the said street: whereupon the defendant civilly requested the plaintiff to cease such his said noise and disturbance, and creating such riot, and to go and depart from before the said house and shop of the

defendant, which the plaintiff then wholly refused to do, and at the said time when, &c. still remained and continued before and in front of the said house and shop of the defendant, there making such noise, riot, and disturbance as aforesaid; whereupon the defendant, *in order to preserve the peace*, and to restore order and tranquillity, then sent for certain police officers who were then on duty in the public street there, and requested them to remove the plaintiff away from before his said house and shop; and the said police officers then civilly requested and entreated the said plaintiff to cease his said noise, riot, and disturbance and abuse, and to go and depart from before the said house and shop of the defendant; and because the plaintiff then wholly refused so to do, and persisted in remaining and continuing, and did remain and continue, before and in front of the said house and shop of the defendant, making such noise, riot, and disturbance and abuse, and hindering and obstructing the defendant in carrying on his lawful and necessary business therein, the defendant, *in order to preserve the peace*, and restore tranquillity, did then charge the said police officers with the said plaintiff, and desired the said police officers to take the plaintiff to the said police station-house in the first count mentioned, and the plaintiff was thereupon taken by the said police officers to the said police station-house, to be there dealt with according to law *for the said breach of the peace*; and the defendant, at the said station-house, charged the plaintiff with creating a disturbance and causing a mob to assemble outside the shop of the defendant, whereupon the said police officers were ordered and directed to take, and did then take the plaintiff from the said station-house to the said public police office, to be there examined touching the premises aforesaid, and to be further dealt with according to law; and the plaintiff accordingly was there then examined by and before certain magistrates acting at the said public police

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office, touching the premises aforesaid ; and the said magistrates, having heard the complaint of the defendant, and having heard the plaintiff as to his defence in the premises, then admonished the plaintiff for such his riotous, disorderly, and illegal conduct and behaviour ; whereupon the plaintiff promised the said magistrates not to create any further disturbance before the said house and shop of the defendant, or to commit any further breach of the peace : and thereupon the said magistrates ordered and directed that the plaintiff should be discharged out of custody ; and the plaintiff was thereupon immediately discharged accordingly ; which are the same supposed trespasses, &c. There was also a similar plea to the second count of the declaration.

Replication to the second and third pleas, *de injuriâ*.

At the trial before *Gurney, B.*, at the Middlesex Sitings in this Term, the facts appeared to be these. The plaintiff and his wife came in the evening of the 10th July last to the shop of the defendant, a baker in Whitechapel, and complained of an overcharge in a bill delivered by him to them. Some inquiry was made by the defendant on the subject, and an altercation ensued, in the course of which the plaintiff and his wife loudly abused the defendant, calling him a cheat, a rogue, &c. The plaintiff's witnesses alleged that the defendant also applied opprobrious epithets to him and his wife. The people passing by were attracted by the noise, and the plaintiff and his wife, going outside the shop, continued to abuse the defendant in a similar manner, until a crowd of above 100 persons was collected, and the street much obstructed. The defendant having repeatedly requested the plaintiff and his wife to go away, which they refused to do, called for the police, and gave them into their custody on a charge of creating a riot and disturbance. They were taken to the station-house, and thence to a police office,

where, having been warned by the magistrate not to commit any further breach of the peace, and having given their promise not to do so, they were discharged. There was very conflicting evidence as to the nature of the disturbance created, and the part taken in it by the plaintiff and his wife. It was admitted, however, by the defendant's counsel, that there was no ground for alleging that any riot had been committed. The learned Judge told the jury, that the allegation of a riot being considered as struck out of the plea, the only question was, to which set of witnesses they would give credit. The jury found a verdict for the defendant.

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Crowder now moved for a new trial, on the ground of misdirection. The riot being out of the case, the facts, even as given in evidence by the defendant's witnesses, did not sustain the plea, and the learned Judge ought so to have directed the jury. The defendant could have no right to give the plaintiff and his wife into custody, much less to take them before a magistrate, and make a formal charge against them, for any mere obstruction to his own business, but only in case of danger to the king's peace. Here there does not appear to have been any breach of the peace; all that is proved is, that the plaintiff and his wife used abusive language, and that 100 persons were collected; but it is not pretended that these persons were committing any disturbance; and the plea does not allege an unlawful assembly. A distinct breach of the peace ought to have been ascertained by the plea, and proved according to the allegation. The defendant, though not bound to prove all the allegations, was bound to prove such of them as amounted to a justification in law of the imprisonment: *Timothy v. Simpson* (a).

(a) 1 C. M. & R. 757.

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Lord ABINGER, C. B.—I think there was no misdirection, and that, on the facts stated by Mr. *Crowder* himself, it cannot be denied that a breach of the peace was committed. The uttering of the abusive words imputed to the plaintiff, abstractedly speaking, undoubtedly would not make it so; but if they are so uttered, and in such a place, as to attract a crowd of a hundred persons, and when that crowd is collected the party continues to use the same abusive language, nobody can tell whether the passions of the crowd may not be thereby inflamed, and whether they may not proceed to execute the vengeance which the party himself invokes and threatens. It is necessary to prevent in the first instance the mischief that may ensue under such circumstances: and I am of opinion that such acts, under such circumstances, do amount to a breach of the peace; and that the policemen were justified, of their own authority, in taking these parties into custody; and if so, the defendant's directing them to do so does not make him liable, on the authority of the case cited by Mr. *Crowder* himself. It was there held that a private person was justified in giving the plaintiff in charge to a policeman, for the purpose of preventing the renewal of an affray to which the plaintiff had just before been a party. So here, if the policemen were justified in taking the plaintiff and his wife into custody, the defendant was justified in directing them to do so. Now the plea states that the plaintiff and his wife made a great noise and disturbance in the public street, and caused a large concourse and mob of persons to assemble and continue opposite the defendant's shop, in breach of the King's peace, and caused a great riot and disturbance in the street, and refused to desist when requested; whereupon the defendant, in order to preserve the peace, sent for the police-officers, and charged them with the plaintiff and his wife, and they were thereupon taken to the station-house, and

to the police office, to be dealt with according to law. Putting the word *riot* out of the plea altogether, I think it discloses a sufficient justification. If the plaintiff, under such circumstances, had gone away when directed to do so, the policeman would have had no authority to follow and take him, because then the breach of the peace would be over. But if he does not, but persists in the same conduct, what is the policeman to do?—if he takes him into custody, as he is certainly entitled to do, there is no other way of proceeding but to take him before a magistrate, that he may determine the matter in due course of law. It appears to me, therefore, that though this might not be a very aggravated case, it was a breach of the peace, and that the plea was proved.

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PARKE, B.—I concur in thinking that there was no misdirection. There can be no doubt that this is a good plea on the face of it, because it states that there was a *riot*; and no doubt the defendant was justified in putting one of the rioters into the custody of a policeman, to be taken before a magistrate. But the riot was not proved; the question therefore is, whether the rest of the plea affords a justification: and I think there does appear, putting aside all that is stated about the obstruction to the plaintiff's shop and his business, a sufficient averment of a breach of the peace. [His Lordship read the plea].

It was held, in the case of *Ingle v. Bell* (a), that after verdict, an allegation that the defendant did the act complained of *in order to preserve the peace*, is equivalent to an allegation that a breach of the peace was in fact committed. So here, after verdict, it must be intended that the plea describes such a noise and disturbance as to amount to a breach of the peace. Then the question is,

(a) 1 M. & W. 516.

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whether the conduct stated in the evidence, of calling the defendant by opprobrious names, and so collecting a mob, and thereby obstructing the public way, does not amount to a breach of the peace: and I think it does; such acts tend to excite the passions of the crowd, and to endanger the person or house of the party so abused: and in the meantime the public way is obstructed, and a nuisance created, which is in itself an indictable offence. I think, therefore, such circumstances do amount to a breach of the peace, although not perhaps an aggravated one, and that the defence is made out.

BOLLAND, B., and ALDERSON, B., concurred.

Rule refused.

HART, Esq. v. HENRY ALEXANDER, Esq.

H., an officer serving in the King's forces in India, in 1815, deposited money with A., B., C.,

ASSUMPSIT for money lent, money had and received, interest, and on an account stated. The defendant pleaded, first, the general issue; secondly, the Statute of Limita-
& D., bankers in Calcutta, trading under the firm of A. & Co. In 1818, A. came to England, having executed a deed whereby he was to cease to be a partner in the firm in 1822, and E. was to be admitted a partner in his room. In 1822, A. accordingly retired from, and E. came into the partnership, and the dissolution was announced in the Calcutta Gazette. It appeared to be the practice of the firm to give notice of changes of partnership to their customers by circular letters: there was, however, no proof that any letter reached H. announcing A.'s retirement. In 1822, A. became a candidate for a seat in the direction of the East India Company, and repeatedly published an address to the proprietors of East India Stock in several newspapers, stating that his connexion with mercantile concerns in India had ceased. Two of these newspapers were taken in at the reading-room of a town where H., who had returned to England, was then resident. The accounts current of A. & Co., were transmitted yearly to H. from 1817 to 1832, and the rates of interest allowed on them varied several times after the year 1822. In 1831, H. executed a power of attorney to the then members of the firm of A. & Co., to collect the effects of a testator in India. In 1832, A. & Co. failed. In 1833, H. executed another power of attorney to C. (who also had then retired from the firm) to prove debts against the estate of the bankrupts, (naming them, and describing them as carrying on business under the firm of A. & Co.), and to receive dividends:—*Held*, that these facts constituted sufficient evidence to go to the jury to shew that H. knew that A. had retired from the firm, and E. had come in in his place; and that he had agreed to discharge A. from liability, and take the new firm as his debtors.

tions; and several other special pleas, of which the sixth only need be stated, which was as follows:—That the defendant heretofore, to wit, prior to the month of May, 1822, carried on business as a partner in a certain copartnership, under the firm and style of Alexander & Co., and that the debt in the declaration mentioned was due and owing from the said firm of Alexander & Co. to the plaintiff. That heretofore, to wit, on the 1st May, 1822, the defendant retired from the said copartnership, and one Nathaniel Alexander then became a partner in the said firm, and the said business was continued to be carried on under the firm and style aforesaid, whereof the plaintiff then had notice; and thereupon afterwards, in consideration that the said Nathaniel Alexander would, with the assent and knowledge of the plaintiff, when he should become partner as aforesaid, as a member of the said firm, become liable to and responsible for the said debt so due and owing as aforesaid to the plaintiff, the plaintiff agreed with the said firm, and with the defendant, to discharge, and did discharge, the defendant from all liability in respect thereof: That the said Nathaniel Alexander did become as aforesaid liable to and responsible for the said debt so due and owing as aforesaid, whereby the defendant became and was discharged as aforesaid.

To this plea the plaintiff replied, that he did not agree with the said firm and the defendant to discharge, nor did he discharge the defendant from all liability in respect of the said debt or any part thereof, in manner and form &c.; on which issue was joined.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after Hilary Term, it appeared that the action was brought to recover from the defendant the sum of 18,150*l.*, being the value in English money of 148,771 sicca rupees, with interest thereon from from the 30th April, 1832, at 5 per cent., alleged to be due to the plain-

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tiff from the defendant, as one of the partners in the firm of Alexander & Co., bankers at Calcutta, under the following circumstances.

The plaintiff, Captain Richard Hart, on the half-pay of the 60th Foot, was formerly on active service in India, and was employed on the expedition against Java in 1815, whence he remitted considerable sums to the house of Alexander & Co., to be deposited with them on his account. The accounts current rendered by Alexander & Co. to the plaintiff in the several years from 1816 to 1832 were put in evidence on the part of the plaintiff; those of the years 1816, 1817, and 1818 were in the handwriting of the defendant. The account of 1816 gave the plaintiff credit for a past balance of 29,518 sicca rupees; and the balance to his credit at the foot of that account was 51,180 sicca rupees. The balance continued to increase through all the subsequent accounts, until, on the 30th April, 1832, it amounted to 148,770 sicca rupees. The rate of interest allowed to the plaintiff varied at different periods, ranging between the rates of 10 and 5 per cent. In 1822 and the two following years it was at 6 per cent.; in 1825 it was reduced to 5. In the year 1816 the firm of Alexander & Co. consisted of the following members; Josias Duprè Alexander, the defendant Henry Alexander, John Fullarton, and Arthur Jacob Macan. In 1818 Josias Duprè Alexander retired, and James Young and Thomas Bracken were admitted partners; and notice of this change in the firm was given to the plaintiff by a circular letter; which was stated to be the custom of the firm on any change in the partnership. In 1818 Mr. Macan died, and George Ballard and J. C. C. Sutherland were admitted partners. In 1822 the defendant retired from the firm, and Nathaniel Alexander was admitted a partner. In 1825 Mr. Fullarton retired, and the other five partners, Young, Bracken, Ballard, Sutherland, and Nathaniel

Alexander, carried on the business until December 1832, when they became bankrupts. No direct notice was proved to have been given to the plaintiff of any of the changes in the firm, except as above stated; and another gentleman, also a customer of the house, who was called on the plaintiff's part, stated that he had not received any notice in the usual way, by circular, of the defendant's having ceased to be a partner. The following evidence, however, was given on the part of the defendant, for the purpose of bringing home to the plaintiff a knowledge of the retirement of the defendant from the firm, and of the accession of Nathaniel Alexander in his room.

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The defendant came from India to England in 1818, having previously executed a deed by which he was to cease to be a partner in May 1822, at the latest, and Nathaniel Alexander was to be admitted on his retirement. On the 6th May, 1822, the dissolution of the firm by the defendant's retirement, and the formation of the new partnership, were announced in the Calcutta Gazette. In the same year, the defendant became a candidate for the office of a director of the East India Company, and inserted thirteen times in the newspapers, amongst others in the Times and Courier, an address to the proprietors of East India Stock, soliciting their suffrages, and stating that all his connexion with mercantile concerns in India had ceased (a): and in 1823, he was elected a director. At this period the plaintiff (who had returned to England some time before, but at what precise time did not appear) was resident at Hythe, in Kent, and was a subscriber to a reading room there, at which the Times and Courier newspapers were taken in. The plaintiff continued to receive his accounts-current yearly, through the house of Fletcher, Alexander, & Co. of London, the agents of the Indian house, until the year 1831: the respective rates of interest charged in each year being stated in such

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accounts. In October 1831, the plaintiff, as one of the executors of a brother of his who had died in Persia, executed at the office of Fletcher, Alexander, & Co., a power of attorney to Messrs. Young, Bracken, Ballard, Sutherland, and Nathaniel Alexander, (describing them as members of the house of Alexander & Co.), to get in property of the testator in India. And in May 1833, he executed another power of attorney to Mr. Fullarton, the former partner in the house of Alexander & Co., together with the members of the firm of Bagshaw & Co., in Calcutta, "to receive of and from James Young, Thomas Bracken, George Ballard, J. C. C. Sutherland, and Nathaniel Alexander, all of Calcutta, merchants and agents, then or lately carrying on business in copartnership, under the firm of Alexander & Co.," all dividends, principal and interest, &c. &c. due to him, the plaintiff, on the balance of any account current, &c., and to vote in the choice of assignees, and prove under the estate, of any bankrupts or insolvents indebted to him.

The Lord Chief Baron, in summing up, stated the law applicable to the case to be this: that where a partner retired from a firm, and a party trading with the firm, having a knowledge of that fact, went on trading with the firm, and entering into new contracts, by taking new rates of interest or otherwise, he thereby acquitted the retired partner, and consented to take the remaining partners for his debtors; and that such was the case even though no new partner came in on the retirement of the old one. His Lordship was therefore of opinion, that if the plaintiff knew, in the year 1825, when he received his account notifying to him a change in the rate of interest, that the defendant had ceased to be a member of the firm,—inasmuch as with that knowledge he thus made a new contract with the continuing partners, the defendant was thereby discharged. And he observed strongly on the several circumstances proved in the cause, and the situation and re-

lations of the parties, as leading to a conclusion that the plaintiff did know of the defendant's retirement from the firm. The jury having found a verdict for the defendant,

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Sir *W. Follett* now moved for a new trial, and contended that there was no evidence to go to the jury to shew that the plaintiff had agreed to discharge the defendant from liability, as alleged in the plea.—The recent cases have settled the law as to the liability of retired partners: and it follows from them, that if the creditor has distinct notice of the retirement of one partner, and the substitution of another in his place, and acquiesces in that arrangement, and by the receipt of some new security, or by some other positive act done, shews that he adopts the new firm as his debtors, then, and not otherwise, the retired partner is discharged. *Thompson v. Percival* (a), *Kirwan v. Kirwan* (b). The effect of those cases was to shake the authority of the case of *David v. Ellice* (c), which had proceeded on the ground that there must be some consideration shewn for the agreement to discharge the retiring partner from liability. Here it is clear that no direct notice to the plaintiff of the change in the firm was proved. [*Parke, B.*—*Knowledge* is sufficient.] Then the circumstances to prove knowledge were merely these:—1st. The publication in the *Calcutta Gazette* of the dissolution; but as the plaintiff was resident in England, that amounted to nothing. 2nd. The advertisement of the defendant's address to the proprietors of East India stock, in the newspapers taken in at the Hythe reading room. But surely it is not to be presumed that a party reads the whole of every newspaper which he is even proved to have seen. And the plaintiff, not being a proprietor of East India stock, would not be interested to notice this ad-

(a) 3 Nev. & M. 167; 5 B. & Ad. 925.

(c) 5 B. & Cr. 196; 7 D. & R. 690.

(b) 2 C. & M. 617; 4 Tyr. 491.

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vertisement. 3rd. The execution of the powers of attorney. Now they would necessarily be given only to the partners who were in India, not to one who was in England; and would therefore have been in the same terms if the defendant had continued a partner the whole time. At the most, they furnish an inference altogether equivocal.

Lord ABINGER, C.B.—My opinion, when this cause was tried, was certainly very strongly in support of the verdict: indeed, I considered the evidence so cogent, that I thought, and still think, it would not be easy to induce a jury to find a different one. The plaintiff was in India in 1815; it is not shewn that he was in England before 1822, when he is residing at Hythe, and subscribing to and attending the reading-room there. As far as appears from the evidence, the defendant left India before the plaintiff did, namely, in the year 1819. Now I think it is a natural presumption that, when a man has invested his money in Indian securities, he takes some interest in what is passing in India, and in the state of the Indian direction: and from my own experience in life I can say, that a person who has been in the military or civil service in India takes great interest in all that relates to that country. It would therefore be highly probable, that the retirement of a partner from an extensive mercantile firm in India would be known to all persons connected with Indian affairs. In the year 1822, the defendant inserts in thirteen different newspapers an advertisement, stating that he is a candidate for a seat in the direction; and in the following year he is elected a director. Now by the law of the land, a person cannot be a director of that company, who has any interest in a mercantile house: and is it then too much to presume that this circumstance was known to the plaintiff, an officer and a gentleman of education, who had served in India, and who had invested his money in the house to which the defendant had belonged? Surely it

is not an overstrained presumption that he knew this to be the law. It appeared further, that two of the newspapers in which the defendant's advertisement was inserted were taken in at the Hythe reading-room; and that accounts were from time to time sent to the plaintiff, which stated the amount of interest allowed by the firm on their deposits. There was no entry of any new transaction after the year 1824, but the accounts consisted only of the addition of interest, the rate of which was several times varied. In 1831, the plaintiff, wishing to send a power of attorney to enable parties in India to administer his brother's effects, is in communication with Fletcher, Alexander, & Co., who are the correspondents of the Indian house; and in their office he executes the power of attorney in question, in which all the partners of the house in India are particularly specified, and from which it may well be presumed that he was aware of the persons who then formed the partnership firm. If it had been intended to be addressed to some of the partners only, the natural description would have been "to A. and B., in partnership with others in the firm of Alexander and Co.:" but upon the face of this instrument the presumption is that the person who signed it must have been aware that the parties named in it were the sole partners in the house. After the firm failed, the plaintiff executed another power of attorney to Mr. Fullarton, who had left the partnership some years, to receive for him the dividends due from the other members of the firm. These circumstances were all strong to shew the great probability, that, although there was no direct proof of notice to the plaintiff by the circular letters, he took such an interest in the solvency, credit, and condition of his debtors, as to know who were the partners constituting the firm at the several periods of time. Under all these circumstances, could I say that there was no evidence to go to the jury that the plaintiff knew the fact that the defendant had left the firm?—and

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if so, was it unlikely that he should also know who were the partners who succeeded him? I can see no one reason why the jury should have inferred that this gentleman did not attend to all his concerns, and did not entertain the least curiosity to know whether the defendant continued a partner. I think there was evidence, and very strong evidence, to go to the jury of his knowledge of that fact; and having that knowledge, the rest seems necessarily to follow.

PARKE, B.—I also think there ought to be no rule. I see no misdirection, and I think there was evidence to go to the jury, and am not dissatisfied with their verdict. It is by no means improbable that if, in *David v. Ellice*, and *Kirwan v. Kirwan*, the question had been left to the jury, instead of being determined by the Court, they would have drawn the same conclusion as in the present case. The first question is, whether the plaintiff had a knowledge of the defendant's retirement from the firm, so as to found upon that knowledge an agreement to accept the new firm as his debtors. On that point I think there was sufficient evidence to go to the jury. It is by no means improbable, under the circumstances, that the plaintiff knew the fact that the defendant had become an East India director. The conclusion of the jury, however, rests most strongly on the fact of the execution of the power of attorney in 1833, as shewing an adoption of the insolvent firm in India as his debtors, instead of the defendant, a solvent person resident in England. Then I think there was also evidence to go to the jury that he knew Nathaniel Alexander had become a partner, and that he agreed to accept the new members of the firm as his debtors, and to discharge the original debtors. There was the fact of his having received accounts from the year 1822 to the year 1832, during which period the firm was several times changed, and the rate of interest was varied from time to time.

This was evidence to go to the jury of a knowledge of the persons sending such accounts. And, as I have already observed, the power of attorney given to Fullarton, to prove the plaintiff's debt against the insolvent firm in India, is strong evidence of his knowledge of the persons composing that firm, and of his adoption of them as his debtors. I apprehend the law to be now settled, that if one partner goes out of a firm, and another comes in, the debts of the old firm may, by the consent of all the three parties—the creditor, the old firm, and the new firm—be transferred to the new firm. In *David v. Ellice*, the retired partner was held liable; but the Court was substituted for a jury in that case, and I much doubt whether twelve merchants would have determined it as the Court did. The authority, however, of that case, as well as of *Lodge v. Dicus* (a), has been much shaken by *Thompson v. Percival*.

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BOLLAND, B.—I am sorry to differ with my learned Brothers, but in this case I think there was no evidence to go to the jury to found the conclusion that the defendant was discharged from liability. No doubt, if the plaintiff, having notice of the change of partnership, adopted the new firm as his debtors, the defendant would no longer remain liable. But clear liabilities can be removed only by clear evidence of their discharge; and looking at the whole of this evidence, I cannot satisfy myself that it was sufficient to raise more than a *probability* that the plaintiff knew of the defendant's retirement from the firm. With respect to the advertisement in the newspaper, we all know that a man is not bound to look at all the newspapers which may lie in the reading-room to which he subscribes; nor to read all that may appear in any one paper. It appears to me, therefore,

(a) 3 B. & Ald. 611.

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too much to consider the fact of the plaintiff having been a subscriber to the room at Hythe as evidence of his knowledge of the change of partnership. And with regard to the power of attorney, it was not necessary to mention in it the names of all the persons composing the firm of Alexander and Co., and I think one would expect that the only names that would be mentioned would be those of such members of the firm as were then in India.

ALDERSON, B.—The general rule is, that if there be no misdirection in point of law, unless the judge who tried the cause is dissatisfied with the verdict, the Court does not grant a new trial. Here the Lord Chief Baron states that he concurs in the finding of the jury. Now some things are clear in the case: it is clear that the defendant left the firm at the period stated in the plea, and also that the plaintiff gave credit to the firm of Alexander and Co., no matter who were the persons who from time to time composed the firm: and I think there was evidence from which a jury might infer that he knew of changes in the firm from time to time: the material question however is, whether he knew of the defendant's having left it. I do not think there is much weight to be attached to the fact of the newspapers containing the defendant's advertisement being in the reading-room; I do not see why it is to be inferred that the plaintiff read the advertisement: nevertheless, I cannot say that it was no evidence at all to go to the jury. The execution of the powers of attorney is the strongest evidence; it is reasonable to suppose the plaintiff looked at them before he executed them, and they would give him reason to suppose that the defendant had retired from the firm, and that Nathaniel Alexander had become a partner. Although, therefore, I cannot say that if I had been upon the jury I should have found the same verdict, I concur in refusing the rule.

Rule refused.

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PLUMMER, Administratrix of M. THOMPSON, deceased, v.
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DEBT on an award.—The declaration stated, that before the making of the submission to arbitration therein-after next mentioned, certain differences had arisen and were depending between the plaintiff, as administratrix as aforesaid, and the defendant, concerning divers sums of money due from the defendant to the plaintiff as administratrix as aforesaid, and of and concerning part of which sums of money there had been a settlement on a certain day in the lifetime of the said M. Thompson, to wit, on the 12th day of July, 1833, which settlement was the last settlement next before the making of the award therein-after mentioned: and thereupon, for putting an end to the said differences, the plaintiff, as executrix as aforesaid, and the defendant, theretofore, to wit, on the 11th June, 1835, respectively submitted themselves to the award of one J. P., to be made between them of and concerning the said differences. And the plaintiff in fact saith, that the said J. P. having notice thereof, and having taken upon himself the burthen of the said arbitrament, afterwards, to wit, on the 13th May, 1836, made his certain award between the plaintiff, as administratrix as aforesaid, and the defendant, and thereby awarded that there was

Debt on an award. The declaration alleged that differences had arisen between the plaintiff, as administratrix of M. T., and the defendant, concerning certain sums of money due from the defendant to the plaintiff, as administratrix, as to part of which there had been a settlement on a certain day in the lifetime of the said M. T., to wit, on &c., which settlement was the last settlement next before the making of the award: and that the arbitrator awarded that there was due from the defendant to the plaintiff 150*l.*, with interest from the period of the said last-

mentioned settlement. The defendant pleaded, first, that the arbitrator did not make any award concerning the premises in the declaration mentioned, *modo et formâ*; 2dly, that the day in the declaration in that behalf mentioned was not the day of the last settlement next before the making of the award; 3dly, that no such settlement as in the declaration mentioned was at any time made. It appeared that the date of the last settlement was not in dispute between the parties.

Held, that the second issue was immaterial; and the jury having found it for the defendant, the Court awarded a repleader as to that issue.

Held, also, that the award was sufficiently certain.

Where a plea raises an immaterial issue, but contains no confession of the cause of action, the proper course is to award a repleader, not to give judgment *non obstante veredicto*.

Where there are several pleas on the record, on which issues are taken, but on none of them the cause of action is fully confessed, or proved, the Court may award a repleader, if one of the issues be immaterial.

On a judgment of repleader, neither party is entitled to costs.

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then due from the defendant to the plaintiff, as administratrix as aforesaid, the sum of 150*l.*, together with interest on the same from the period of the said last-mentioned settlement, on payment of which a receipt in full should be given : of which said award the defendant afterwards, to wit, on &c., had notice. The declaration then averred that although the plaintiff, as administratrix as aforesaid, had always been willing to receive the monies so awarded, and on payment thereof to give a receipt in full, the defendant had not paid the same, or any part thereof, &c. ; and concluded with profert of the letters of administration.

Pleas, first, that the arbitrator did not make any award of and upon the premises in the declaration mentioned, in manner and form, &c. ; secondly, that the day in the declaration in that behalf mentioned was not the day of the last settlement next before the making of the said award, in manner and form, &c. ; thirdly, that no such settlement as in the declaration mentioned was at any time made : on which issues were joined.

At the trial before *Alderson*, B., at the Middlesex sittings in Hilary Term, the plaintiff had a verdict on the first and third issues, and the defendant on the second. On a subsequent day, *W. H. Watson* obtained a rule to shew cause why judgment should not be entered for the plaintiff non obstante veredicto on the second issue, on the ground that it was an immaterial one ; and *R. V. Richards*, for the defendant, also obtained a rule nisi for a new trial, on the ground that the award was uncertain, in not defining which was "the last settlement" referred to by the arbitrator. Both rules now came on for argument together.

Richards, for the defendant.—The award is uncertain on the face of it, unless aided by some extrinsic averment. The period from which interest is to be calculated is

wholly unascertained. Without the averment in the declaration that there was a settlement on a certain day, to wit, the 12th of July, how could the defendant know which was the day of the last settlement? Unless that is defined, he cannot pay money into Court. The defendant could not traverse the fact of a settlement having been come to, since he admits there was a settlement. The statement of the precise period was the only thing which could enable him to perform the award. This was a fact which could only be in the knowledge of the arbitrator; and it is no answer to say that he might have been called to shew to what settlement he referred; he might have died before the trial. An award must be certain in its terms, or capable of being rendered certain without the aid of extrinsic averments: *Cargey v. Aitcheson* (a). The averment of time in the declaration, therefore, although laid under a videlicet, is material, and the declaration might have been demurred to for the want of it. Without it, the defendant could not know what money had been paid before action brought.

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Watson, contra.—The arbitrator having directed a payment of money, with interest, since the date of the last settlement, the date or time of such settlement is not material. This is a substantial allegation of the declaration, not matter of description, and therefore the addition of the videlicet shews the day to be immaterial. If money be payable on a certain event, it cannot be necessary in pleading to aver *the day* of the happening of that event; and if the day be made parcel of the issue where it ought not to be, it is immaterial. *Bennet v. Holbeck* (b). [*Parke*, B.—It certainly strikes me that the allegation of the time is quite immaterial. *Alderson*, B.—As to the

(a) 2 B. & Cr. 170; S. C. on error, 2 Bing. 199. (b) 2 Saund. 317.

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objection that it was impossible to pay money into Court, the defendant might have demanded a particular]. Then, in the next place, the award is sufficiently certain. *Id certum est quod certum reddi potest* ; the omission of the date may be supplied by averment. In *Beale v. Beale*, Roll. Abr., Arbitrement, H. 14, it is said, "Si un submission soit de tous controversies touchant un voiage al mere, et un obligation oue condition pur performance de ceo ; et un agard est fait que l'un paiera son parte del charge del voiage, et allowera son proportionable parte del losse que venera al niege per le voiage sur accompt ; et agard oustre de l'auter parte, &c. Comment que cest agard soit de luy mesme uncerten, uncore en tant que poet estre reduce al un certentie, ceo est un bon agard." That case is not distinguishable in principle from the present. Another rule is, that nothing shall be intended against an award. Besides, if the date may or may not be uncertain, this uncertainty ought to have been pleaded. *Cargey v. Aitcheson, Hanson v. Liversedge (a)*. Suppose the award had directed the party to pay interest from the death of A. B., this would be capable of proof by allegation and evidence.

Richards.—The submission was of all matters in difference. If, then, all the matters in evidence are not legally determined upon, it is open to the defendant to take advantage of the omission, under the traverse of the award having been made *modo et formâ*. Even the case put on the other side, of an award made for payment of interest from the death of an individual, would be bad by reason of uncertainty. It is impossible to tell what was operating on the arbitrator's mind as to the *last* settlement ; and as the award points to several settlements, unless the

(a) 2 Vent. 242.

last settlement is defined, the award is uncertain and bad. The arbitrator himself was the only person who could have proved his own meaning; so that the defendant is only changing one matter of controversy for another. If the arbitrator had referred to a fact that might be known with certainty aliunde, it would have been different; but it is impossible to say with certainty to what settlement he intended to refer. [*Parke, B.*—May not the award be good as to the principal, though it be bad as to the interest?]

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THE COURT intimated that it was matter for consideration whether it would not be necessary to award a repleader, instead of entering up judgment non obstante veredicto, as prayed; and accordingly,

Cur. adv. vult.

The judgment of the Court was delivered on a subsequent day in the term, by

PARKE, B.—[After stating the pleadings, he continued]: The first question to be disposed of is the rule for a new trial.

This award appears to the Court to fall within the principle laid down in the case of *Cargey v. Aitcheson (a)*. It is not necessarily uncertain. If the time of the last settlement mentioned in the award was uncertain, or matter in dispute, the award would have been bad. We need not decide whether that objection would have been open to the defendant on this plea: because, admitting that it was so, it appeared distinctly in proof that the date of the last settlement was certain, and was not a matter in dispute between the parties, but was mutually agreed on by them both. We have no doubt, therefore, but that the award is good, and the first issue properly found for the plaintiff.

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The next question is, whether the second issue be immaterial, and what is the consequence if it be not?

We are clearly of opinion that it was immaterial. The precise day of the last settlement was of no consequence, if a last settlement had been made in the lifetime of the intestate, and before the reference. If there had been no other plea on the record, the proper course would have been to award a repleader, and not to have given judgment non obstante veredicto. That form of judgment proceeds on the confession in the plea, and the insufficiency of the avoidance: but in this plea, there is no confession, on which judgment can be given; it raises an immaterial issue, without any confession. The next question to be considered is, whether a repleader ought to be awarded, as there is another proper issue raised, and decided for the plaintiff, on this record, on which, if it stood alone, the plaintiff would clearly be entitled to judgment. In the case of *Goodburne v. Bowman* (a), it is for the first time suggested, that if an immaterial issue be raised by one plea, and the cause of action is fully confessed, or proved, on another, on the same record, the plaintiff is entitled to judgment on that confession, or proof, and a repleader would not be awarded. But the present case is distinguishable from that, for here no plea contains a confession of any part of the cause of action; and there is no issue upon any plea, establishing the truth of the whole of it; and we are not aware of any precedent that a repleader can be granted *as to part*: consequently, as there can be no judgment on a confession, there must be a repleader. To save the expense of a formal judgment, the parties should amend without costs on either side.

The following was the rule drawn up:—"It is ordered that the rule for a new trial be discharged; and it is fur-

(a) 9 Bing. 532; 2 M. & Scott, 700.

ther ordered that the parties be at liberty to amend without payment of costs; but if the defendant does not amend within a week, then the plaintiff is to have judgment of repleader, on the rule for judgment non obstante veredicto."

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Neither party amended, and the plaintiff signed judgment of repleader, and gave a new rule to plead, and served a demand of plea. The defendant thereupon took out a summons, and obtained a judge's order, to stay the proceedings on payment of debt and costs. On the taxation of costs, the Master decided that the plaintiff was entitled to the general costs of the cause, and accordingly allowed him the costs of trial, of the first and third issues, and of the motion for a new trial, but disallowed him the costs of the second issue. On the following day the plaintiff's attorney signed final judgment for want of a plea on the repleader, and served the defendant's attorney with a bill of further costs of such judgment. On the 2nd June,

Richards obtained a rule nisi to review the taxation, and to set aside the judgment, on the ground that, on a judgment of repleader, neither party was entitled to any costs.

Watson shewed cause.—The order was to stay proceedings on payment of debt *and costs*; the question is, what are those costs? Before the new rules, undoubtedly, there were no costs on either side on a judgment of repleader. But the rule of H. T. 2 Will. 4, s. 74, which directs that the costs of all issues found for the defendant shall be deducted from the plaintiff's costs, appears to have introduced a new general principle of taxation.

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Before the new rules, the costs on a judgment non obstante veredicto were subject to the same rule as on a repleader; *Da Costa v. Clarke* (a): but now, if there were an issue going to the whole cause of action, on a judgment non obstante veredicto, the costs of the issues found for the plaintiff would be taxed for him, and the defendant would be entitled to costs on such issue found for him.

PARKE, B.—No—the Court of Common Pleas has decided the contrary (a), and I think rightly. The party is entitled to costs where he was so entitled under the statute of Anne; he cannot have the costs of issues found for him where there is judgment non obstante veredicto. I think the new rule referred to makes no difference here. It is not one of the parliamentary rules, therefore could not alter the law; all that it did was to put a proper interpretation on the statute of 23 Hen. 8, c. 15, setting aside those decisions which had held, that where a defendant succeeds on part of a divisible cause of action, he is not entitled to costs for that part. We thought that was wrong, and therefore the rule in question was framed. But this case must follow the general rule of a repleader; the parties must begin again at the first fault, and the subsequent pleadings go for nothing. The rule must therefore be absolute for a review of the taxation; and also to set aside the judgment, but without costs; the plaintiff ought not to pay the costs of his judgment, as the defendant did not obtain a stay of proceedings.

Rule absolute accordingly.

(a) 2 Bos. & P. 376.

Bing. 667; 3 M. & Scott, 69; 2

(b) *Goodburne v. Bowman*, 9 Dowl. P. C. 206.

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DOE *d.* LEWIS LEWIS *v.* REES DAVIES.

AT the trial of this ejectment, at the Cardiganshire Summer Assizes, 1836, before Lord *Denman*, C. J., the lessor of the plaintiff established a clear title to the premises in question as heir-at-law; to part of them as heir-at-law of his mother, Ann Lewis the elder, and to the residue as heir-at-law of his sister, Ann Lewis the younger.

The defendant, in answer to this case, sought to establish a life estate in the premises, under an indenture of the 15th of November, 1822, made between the said Ann Lewis the elder of the first part, the said Ann Lewis the younger of the second part, himself the said defendant of the third part, and Lewis Lewis and David Davies of the fourth part; whereby, after reciting that Ann Lewis the elder and Ann Lewis the younger were respectively entitled to the premises therein described, by purchase from the commissioners under an enclosure act, and that a marriage had been agreed upon, and was intended to be had and solemnized between the defendant Rees Davies and the said Ann Lewis the younger, and that upon the treaty for the marriage it had been agreed upon by and between the said Ann Lewis the elder and Ann Lewis the younger in manner following; that is to say, she the said Ann Lewis the elder on her part did thereby *undertake and agree to convey and assure unto the said*

Ejectment.—
One A. D. L. being seised of a part of certain lands, and one A. L., her daughter, seised of another part, executed a deed of settlement previous to the marriage of A. L. the daughter with R. D., dated the 15th November, 1822, by which, after reciting that A. D. L. and A. L. were respectively entitled to several parts of the premises, and that a marriage was intended to be had between R. D. and A. L., it was witnessed, that in consideration of 2*l.* to the said A. D. L. paid by the said R. D., and for and in consideration of the said intended marriage, and also in consideration of 10*s.* to each of them the said A. D. L.

and A. L. by L. L. and D. D. in hand paid, they the said A. D. L. and A. L., and each of them did grant, bargain, sell, alien, enfeoff, and confirm unto the said L. L. and D. D., their heirs and assigns, (the premises in question), to hold unto them the said L. L. and D. D., their heirs and assigns, upon the trusts thereafter mentioned, viz., to the use of the said R. D. and his assigns for life, with divers remainders over. The indenture was duly executed by A. D. L., A. L., and R. D., and the marriage took effect soon after the execution of the deed, and R. D. had possession of the premises up to the time of the trial, in July 1836. The deed had indorsed upon it a memorandum of livery of seisin, but no names were subscribed to it, nor was any direct evidence given of livery of seisin having been made, nor was it shewn that L. L. and D. D. (the trustees) were in any way related to the settlors. A. D. L. died in 1831, and A. L. in 1835.

Held, that this deed operated as a covenant to stand seised, and that a good use passed to R. D., the husband.

Semble, that possession for a less period than 20 years is not sufficient to leave to the jury for them to presume that livery of seisin has been made.

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for the uses and purposes thereafter mentioned and expressed of and concerning the same, in consideration of 2*l.* of British money, to be paid to her by the said defendant at or before the execution of those presents, the said messuage, &c., (describing the premises belonging to Ann Lewis the elder): and the said Ann Lewis the younger on her part did *thereby also undertake and agree to convey and assure the said, &c.,* (describing the premises belonging to her), *to the same trustees and their heirs, subject to the same uses and limitations* thereafter mentioned: it was by the said indenture witnessed, that, in consideration of the sum of 2*l.* to the said Ann Lewis the elder in hand well and truly paid by the said defendant at and before the sealing and delivering of the said indenture, the receipt whereof, and that the same was in full for the absolute purchase of the hereditaments thereafter granted and enfeoffed, or intended so to be, and the fee-simple and inheritance thereof in possession free from incumbrances, she the said Ann Lewis the elder did thereby admit and acknowledge, &c.; *and for and in consideration of the said intended marriage,* and of the [here was an erasure in the deed] paid by the said defendant at the request of the said Ann Lewis the younger, the receipt whereof was thereby acknowledged; and also for and in consideration of the sum of 10*s.* of like lawful money to each of them the said Ann Lewis the elder and Ann Lewis the younger by the said Lewis Lewis and David Davies in hand respectively paid at or immediately before the execution of the said indenture, the receipt whereof was thereby acknowledged: she the said Ann Lewis the elder, so far as related to the said messuage, &c., (her part of the preimises); and the said Ann Lewis the younger, so far as related to, &c., (her part of the premises), did, and each of them did grant, bargain, sell, alien, enfeoff, and confirm unto the said

Lewis Lewis and David Davies, their heirs and assigns, all and singular, &c., (the premises in question), with their appurtenances, in as large, ample, and beneficial a manner as the said Ann Lewis the elder and Ann Lewis the younger purchased the same from the said commissioners; together with all houses, &c., and all the estate, &c., to have and to hold the same respectively, with their appurtenances, unto the said Lewis Lewis and David Davies, their heirs and assigns, to such uses and upon such trusts, and to and for such intents and purposes, and subject to such provisions and agreements as were therein-after mentioned, expressed, and declared of and concerning the same; that is to say, to the use and behoof of the said Rees Davies and his assigns for and during the term of his natural life, without impeachment of waste, and from and after his decease remainder to the use of Ann Lewis for life, with divers remainder over. The indenture was admitted by the lessor of the plaintiff to have been duly executed by Ann Lewis the elder, Ann Lewis the younger, and Rees Davies the defendant; and it appeared that the defendant married Ann Lewis the younger shortly after the execution of the deed, and had been in possession of the premises from thence up to the time of the trial, a period of about fourteen years. The indenture had the following memorandum indorsed thereon:—

“ Be it remembered, that this — day of — one thousand eight hundred and twenty-two, peaceable and quiet possession and seisin of the messuage and dwelling-house, fields, closes, pieces or parcels of land, and all the premises within granted and enfeoffed was delivered by the within named Ann Lewis the elder and Ann Lewis the younger to the within named Lewis Lewis and David Davies, to hold to them the said Lewis Lewis and David Davies, their heirs and assigns, according to the tenor

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and effect of the within deed, in the presence of us whose names are hereunto subscribed."

No names were subscribed to this memorandum, and the blanks were not filled up, nor was any direct evidence given of livery of seisin having been made, nor was it shewn that Lewis and Davies (the trustees) were in any way related to the settlors.

It was contended at the trial, on the part of the defendant, first, that the length of possession proved was sufficient evidence, from which it ought to be left to the jury to infer *livery of seisin*; and secondly, that the conveyance being in consideration of marriage, the instrument operated as a *covenant to stand seised*. The learned Judge, in order to save the necessity of another trial, left the first question to the jury, who said that they were satisfied by the length of possession that livery of seisin had been made, and accordingly found for the defendant; but his Lordship, on the authority of what is said by *Littledale, J.*, in *Doe v. The Marquis of Cleveland* (a), directed the verdict to be entered for the plaintiff, and gave the defendant leave to move to enter a verdict, or for a nonsuit, on either or both the points taken at the trial.

J. Wilson having, in Michaelmas Term last, obtained a rule nisi accordingly,

E. V. Williams and *Nicholl* shewed cause.—The learned Judge was right on both points in directing the verdict to be entered for the plaintiff. With reference to the first point, the question of livery or no livery ought not to have been submitted to the jury: a possession for less than twenty years does not even afford *prima facie* evidence from which *livery of seisin* can be inferred; there

(a) 9 B. & Cr. 864.

was therefore no evidence of livery to leave to the jury, and they were wrong in finding that livery had been made. *Doe d. Wilkins v. The Marquis of Cleveland* is a direct authority to shew that possession for a less period than twenty years is no evidence of livery of seisin. Lord Tenterden there says, "The length of time which has elapsed since the feoffment, (seven years), was not sufficient to justify the jury in presuming that livery was made." And *Littledale, J.*, says, "No possession short of twenty years is sufficient to warrant a jury in presuming the fact of livery of seisin." The second point is one of a little more difficulty, but on an examination of the authorities it will be found that the instrument in question could not operate as a covenant to stand seised. A covenant to stand seised to uses must be in consideration of blood or marriage; and as with respect to the consideration of blood, the party in whose favour the use is to be raised must be related to the covenantor; so with respect to that of marriage, the person in whose favour the use is to be raised must be a party to the marriage. But here Lewis and Davies, the trustees, are mere strangers; as between the settlors and them there is neither the consideration of blood or marriage. In *Hare v. Dix (a)*, where one J. P., being seised in fee of certain lands, in consideration of natural love and affection for his son, gave, granted, and enfeoffed two strangers of the said lands, to hold the same to the use of himself for life, with remainder to his son in tail; and also covenanted with the strangers that they should enjoy the lands to and for the uses before specified, and the deed was never executed by livery; the Court decided, by their first resolution, that no estate passed to the trustees, because they were strangers, and there was therefore no consideration for raising a use as to them. And they resolved, fifthly,

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that the express covenant raised no use in the covenantees, for the same reason. It is true that in Mr. Serjeant Williams's (a) note to *Chester v. Willan*, the case of *Hore v. Dix* (b) is said to be overruled by that of *Ros v. Transmarr* (c); but when the two cases are compared, it will be found that all that the learned annotator meant to say was, that *Hore v. Dix* was overruled as to the point then under discussion only, namely, as to the resolution reported to have been come to in that case, that an instrument which was intended to operate in one way cannot be construed so as to operate in another; and in which respect *Hore v. Dix* undoubtedly cannot be supported; but it has never been overruled as to the first resolution, namely, that a use under a covenant to stand seised cannot be raised in favour of a stranger. It is said by Mr. Sanders, in his treatise on Uses and Trusts (d), that if a man covenant to stand seised for the use of himself for life, with remainder to the use of trustees, (who are not his relations), for the purpose of preserving contingent remainders, no use would vest in the trustees, because the consideration does not extend to them. And where property was conveyed even to a relative for life, with a general leasing power, it was held that the power was void, because the lessees would be strangers in blood to the covenantor; *Cross v. Fausterditch* (e). It is not contended that the word "grant" may not be construed to operate as a covenant to stand seised; but in no case has it been so construed where the grant has been to strangers, or trustees have intervened between the grantor and those intended to take beneficially under the grant. In *Osman v. Sheaf* (f), a grant, with a letter

(a) 2 Saund. 97, n. (1).

(b) 2 Sid. 25.

(c) Willea Rep. 682; S. C. 2 Wils. 75.

(d) Page 83; S. P. Watk. Conv. by Coventry, 296, n.

(e) Cro. Jac. 181.

(f) 3 Lev. 370.

of attorney to deliver seisin, which was not afterwards delivered, was held to operate as a covenant to stand seised; but in that case the grant was to a relative. So, in *Baker v. Lade* (a), where the words "give and grant" were held to have a similar operation, the grant was to the grantor's own son. The case of *Thorne v. Thorne* (b) will be relied on on the other side, in which, a grant to trustees to stand seised to the use of the grantor's brothers is reported to have been held to operate as a covenant to stand seised; but that case is very distinguishable from the present. In the first place, it was the decision of a Court of Equity, and there is nothing to shew that the conveyance was not made for a valuable consideration, in which case that Court would have decreed its performance, notwithstanding it may have been void at law; and, secondly, there was in that case an express covenant from the grantor that the cestui que trust should enjoy according to the estates limited to them by the deed, a reason which is assigned by Chief Baron *Comyn* (c) for the decision come to in that case; besides which, the case is very shortly reported; there is nothing to shew that the trustees were not the relatives of the grantor, and Vernon is notoriously inaccurate. In the case now before the Court there is no such covenant; for the recited undertaking from Ann Lewis, the elder and younger, to convey the premises to the trustees in trust for the uses thereafter declared, does not amount to a covenant that the cestui que trust shall enjoy. [*Parke, B.*—That part of the deed is by way of recital only, and cannot amount to a covenant that the defendant shall enjoy]. In *Doe v. Simpson* (d), although one of the grantees was a stranger, yet the other was one of the parties to the marriage; and it is sufficient if the consideration of blood or marriage arises

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(a) 3 Lev. 291.

(b) 1 Vern. 141.

(c) Com. Dig. Covenant, G. 2.

(d) 2 Wilson, 226; S.C. Willes,
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from any one of the grantees, for then, the whole use is executed in the one from whom the consideration arises (a). Besides, in that case, there was also an express covenant in the deed that the lands granted "should remain and continue unto the uses, intents, and purposes aforesaid, and according to the true intent and meaning thereof." In *Roe v. Tranmarr* (b), the grant was to a relative, the grantor's brother, and there also there was an express covenant that the grantor had power to grant, and that all conveyances and assurances of the lands in question should enure to the uses of that deed. With respect to *Sleigh v. Metham* (c), which may also be cited on the other side, although in that case the covenant and grant were made to and with the strangers, yet no estate or interest whatever was given to them; the covenant was not that they should enjoy, but to and with them that the intended wife should enjoy. And there also was in that case an express covenant from the settlor that the premises should remain and be to and for the uses mentioned in the deed. At all events, the instrument in question cannot be construed to operate as a covenant to stand seised with respect to the mother's part of the property; for, the deed states the consideration for the grant of her part to have been a money consideration; and to shew that the real consideration was her daughter's marriage would be to shew a consideration inconsistent with the deed, which cannot be done; *Peacock v. Monk* (d). Had the consideration stated been money and divers other considerations, the case would have been different.

J. Wilson, contra.—As to the first point, the question of livery or no livery was a question of fact for the jury, and was properly left to them to decide. [*Parke, B.*—Was there

(a) 2 Roll. Abr. 784; Pl. 2 & 4.

(c) 1 Lutw. 782.

(b) 2 Wils. 75; S. C. Willes,

(d) 1 Ves. sen. 128.

any evidence of livery in this case to go to the jury? and if there was, will not a single day's possession be equally evidence of livery?] The case referred to on the other side, of *Doe d. Wilkins v. The Marquis of Cleveland* (a), cannot be considered an authority in point; the question before the Court in that case was, whether evidence of the hand-writing of one attesting witness was properly received, without its having been first proved that such witness was dead. What is reported to have been said in that case by Lord *Tenterden* and *Littledale*, J., as to possession for less than twenty years not being evidence of livery, was not only perfectly extrajudicial, but expressly contrary to what is laid down in *Bac. Abr. tit. Evidence*, 648. But even should the Court think that the jury drew a wrong conclusion on the evidence before them, still, as their decision is already consistent with equity and justice, and the real merits of the case, the Court will not disturb their finding; *Wilkinson v. Payne* (b); for there is no doubt that the defendant would be relieved in a Court of Equity. [*Parke*, B.—The position stated in the margin to that case is too general, and cannot now be supported]. Secondly, a use arose in this case by virtue of the deed to the defendant for life, which is a sufficient answer to the ejectment. The question here is, whether a settlor can covenant with strangers for the benefit of his relatives, so as to raise a use in favour of his relatives. It is not contended that a covenant made to a stranger would raise a use in his favour, but that a covenant to A., a stranger, that the covenantee shall stand seised for the use of B., a relative, raises a good use in B., the relative. [*Parke*, B.—The plaintiff does not say that a covenant to a stranger that a relative shall enjoy, is void, but that a covenant to a stranger that *he* the stranger shall enjoy, though for the use of a relative, is void]. Here the settlors clearly in-

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(a) 9 B. & C. 864.

(b) 4 T. R. 846.

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tended to give the defendant a life estate in the premises, and *Roe v. Tranmarr* (a), and *Doe v. Salkeld* (b), are authorities to shew that the Court will be very astute, and struggle hard to construe deeds so as to effectuate the intention of the parties. [*Parke, B.*—Does not Lord Chief Justice *Willes* decide the latter case on the ground of there being an express covenant that the lands should go to the grantee?] He puts it both ways, on the ground of the grant, as well as on that of there being an express covenant. In *Walker v. Hall* (c), a feoffment and grant in consideration of marriage, where no livery was made, in order to effectuate the intention of the parties, was construed to amount to a covenant to stand seised. In *Doe v. Simpson* (d), one of the grantees was a stranger, and yet the grant was held to operate as a covenant to stand seised. But *Thorne v. Thorne* (e), and *Sleigh v. Metham* (f), are both expressly in point. The grant in *Thorne v. Thorne* was to trustees to the use of the grantor's relatives, and it was held to be a good covenant to stand seised. The report in Vernon, though short, is accurate, as appears by reference to the Register's book (g). The decree expressly states the deed to be

(a) Willes, 682; S. C. 2 Wils.
75.

(b) Willes, 672; S. C. 2 Wils.
22.

(c) 2 Lev. 213.

(d) 2 Wils. 22.

(e) 1 Vern. 141.

(f) 1 Lutw. 782.

(g) *Thorne v. Thorne*, Registrar's Book, 22nd February, 1682.

The bill, which was by Henry Thorne against Roger Thorne and Michael Warren, stated, that on the 2nd December, 13 Car. 1, John Thorne, plaintiff's uncle, did, by deed for the settling and continuing in his name and blood, and for other good causes and considerations, all his lands called New Mill, &c., give, grant, enfeoff, and confirm unto Edmund Cudmore

and Robert Hanke, Esqrs., since deceased, and their heirs, all, &c., in trust to the uses following:—To the use of himself for life, remainder to the use of Sarah May, his only daughter and heir, and the heirs of her body; remainder to the use of Henry Thorne and the defendant Roger Thorne, brothers of the said John Thorne, and one John Thorne, son

good as a covenant to stand seised, and it contains no statement whatever respecting the covenant referred to

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of *Zachary Thorne*, another brother of the said John Thorne, and the heirs of their bodies, equally to be divided between them. That the settlor died, and that Sarah May is also dead, and her issue. That Henry Thorne, brother of the grantor, died before Sarah May, leaving John Thorne, his eldest son and heir, and brother to the plaintiff, which John Thorne is dead without issue, and plaintiff is the next son and heir of the said Henry and John Thorne; and the defendant Roger Thorne being living, and also John Thorne, son of Zachary, the lands descended to them and the plaintiff, as tenants in common. That the defendant Roger Thorne having for some inconsiderable sum bought of John Thorne, the son and heir of Zachary, who was eldest brother and heir of John the grantor, who died without issue, all his right to the aforesaid lands, the defendant pretends that *the aforesaid deed of settlement was not sufficiently executed*, and therefore the plaintiff hath no title to the same, or any part thereof, and hath entered on the premises and receives the profits of them, and having gotten the deed of settlement refuses to let the plaintiff have a third part of the premises. The bill prayed that the plaintiff might enjoy a third part of the premises, and have an account of the yearly value thereof, and of the profits since the defendant hath received the same, and that the lands may

be set out and divided according to the purport of the said settlement.

The defendant Roger Thorne admitted that he hath in his custody a writing, dated 2nd December, 13 Car. 1, purporting to be a grant of the lands by John Thorne to Cudmore and Hanke to the uses in the bill, and to which a seal is affixed and the name John Thorne thereunto subscribed, and is mentioned to be sealed and delivered by John Thorne, but believes it was never executed so as to convey the estate thereby intended to be conveyed, and that in the writing there is a power of revocation reserved to the said J. Thorne of the whole contents thereof; that John Thorne did by deed indented, 24th February, 20 Car. 1, grant and convey part of the premises to the defendant, his heirs and assigns, by way of mortgage; that the money was not paid; that J. Thorne died seised in fee-simple of all the rest. That the premises whereof he died seised, descended to Thomas May his grandson, who, dying without issue, it came to John Thorne, eldest son and heir of Zachary, who was eldest brother to John (grantor), who died seised, who thereupon entered on the premises, and for valuable consideration conveyed to the defendant Roger Thorne in fee by lease and release; and the defendant, being a purchaser, doth claim the same, and the profits thereof, since the purchase, and is

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by the reporter. *Sleigh v. Metham* (a) is also a case where trustees intervened; there a grant to trustees for the use of an intended wife was held to amount to a covenant to stand seised, and though many objections were taken to the deed in that case, it was never once suggested that the fact of the grantees being strangers invalidated it. As to the case of *Hore v. Dix* (b), it is treated as entirely overruled, as well in the learned note to *Chester v. Willan* (c), as in a note in the first volume of Mr. Jarman's edition of Bythewood's *Precedents in Conveyancy*. But even supposing an express covenant to be necessary, here the agreement, whereby the settlors undertake to convey and assure the premises to and for the uses and limitations mentioned in the deed, amounts to such a covenant. [*Parke, B.*—That part of the deed is by way of recital only, and cannot amount to a covenant, or raise a use: it is purely executory].

Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—This case was argued before my brothers

advised that the plaintiff hath no title to the premises.

Whereupon, and upon long debate of the matter, and upon producing of the aforesaid deed of settlement, the Court declared that the same was a good conveyance, and did amount to a covenant to stand seised, and the uses and estates thereby limited and created were well raised, and the plaintiff was well and duly entitled to a third part of all and every the lands and premises thereby so settled and conveyed as aforesaid, and ought to enjoy the same, notwithstanding the defendant's pretended purchase from the heir-at-

law of the said John Thorne, the same being with full knowledge and notice of the aforesaid deed of settlement; and therefore doth think fit, and so order and decree, that the defendant Roger Thorne, from the time of the plaintiff's entry into and becoming entitled to the aforesaid lands, do account for a third part of the rents before the Master. Commission of partition ordered to issue. Injunction previously granted against committing waste continued.

(a) 1 Lutw. 782.

(b) 1 Sid. 25.

(c) 2 Saund. 97, a. n. (1).

Bolland and *Gurney* and myself, in the course of the last term, on shewing cause against a rule nisi to enter a non-suit. It was an ejectment brought to recover a small estate in Cardiganshire. Ann D. Lewis was seised of a part of the lands, her daughter Ann Lewis of another part; Ann Lewis married the defendant. The defendant went to live with his wife's mother upon the marriage, and continued to live with her until and after her death, which happened about 1831, and down to this time. The defendant's wife died about 1835. The lessor of the plaintiff was the heir-at-law both of Ann D. Lewis and Ann Lewis, and sought to recover the land in question in that character.

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On the marriage of Ann Lewis, in December, 1822, a settlement was executed, which was drawn in a very artificial manner, and on the legal operation of which the principal question in the case depends.

[The learned Baron here stated the deed].

The defendant raised three objections to the right of the lessor of the plaintiff to recover, and contended that he was entitled to the whole estate by virtue of the settlement:—First, because the deed operated as a feoffment, as livery of seisin might be presumed by the jury from the fact of possession by the defendant. And, secondly, if it was not to be presumed, that the deed would operate as a covenant to stand seised. Thirdly, he also contended, that as to the share of the daughter, the mother was tenant in possession, and that the deed would operate as a *grant* of the reversion. Upon referring, however, to the evidence, it appears that there was no proof that the mother was tenant to the daughter, and therefore this objection fails.

Lord *Denman*, before whom the cause was tried, was of opinion, in conformity with the decision of *Doe* d.

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Wilkins v. Marquis of Cleveland (a), that the possession ought not to be left to the jury as evidence of livery of seisin, as it was for a less period than twenty years; but, in order to save expense, he left the question to the jury, who found the fact that livery of seisin was made; but notwithstanding that finding, his Lordship directed a verdict for the plaintiff, reserving to the defendant liberty to move to enter a nonsuit, and he also reserved the question as to the operation of the deed.

As we are all of opinion that the deed operated as a covenant to stand seised, it is not necessary to decide whether the evidence of possession ought to have been left to the jury or not; but we by no means wish to be understood as intimating any doubt as to the propriety of the decision of the Court of King's Bench in the case cited; that is, in effect, that if the fact of livery of seisin is sought to be inferred from *possession alone*, such possession ought to have existed for twenty years.

The question then is, as to the effect of the settlement.

The rules as to the exposition of deeds, and their operation in a manner different from that intended, are now fully settled, and very distinctly stated in the judgment of Lord Chief Justice *Willes*, in the two cases of *Doe v. Sal-keld* and *Roe v. Tranmarr* (b), and more particularly in the latter. It is there stated, that in more recent times the Judges have been much more liberal than formerly, and have had more consideration for the substance, the passing of the estate, according to the intent of the parties, than the shadow, namely, the manner of passing it. And it is laid down, in respect to covenants to stand seised, that there is no conveyance that admits of such a variety of words; and that it is sufficient, if these five things concur,—That there be a deed; words sufficient to make a covenant; that the grantor must be actually seised at the

(a) 9 B. & Cress. 864.

(b) *Willes*, 673, 682.

time; that his intent be plain to raise the use; and that there be a proper consideration to raise it.

In the present case, all these circumstances are found. There is a deed; the word "grant" is sufficient to make a covenant; the two grantors were both seised; the intent that the husband was to have the use for life is abundantly clear; and the marriage with the daughter is unquestionably a sufficient consideration.

The only objection which can be raised as to the operation of the deed is, not that the intent to raise an use was not plain, but that the intent was to raise that use out of the seisin of the trustees, and not out of that of the grantors; and that *such intent* could not operate, as the trustees could not, it is admitted, take any estate at all: and this objection was grounded on the authority of the case of *Hore v. Dix* (a), where it was held that a covenant with strangers, that *they* should hold the land to the use of the grantor for life, with remainder to the son, was void. But Lord Chief Justice *Willes* considers this very objection in the case of *Roe v. Tranmarr*, and intimates his dissatisfaction with that decision upon this point. He says that he should have been of another opinion, "because, in a covenant to stand seised, the estate properly arises out of the estate of the grantor, and his intent that it should *not*, I think, signifies nothing: for though his intent is to be regarded what estate is to pass, and to whom, it is not at all to be regarded as to the manner of passing it, (of which he is supposed to be ignorant); if it were, it would overturn almost all the cases." And though the learned Chief Justice distinguishes the case then under consideration from that of *Hore v. Dix* and *Samon v. Jones* (b), there can be no doubt but that the learned editor of the valuable edition of Saunders's Reports is right in stating,

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(b) 2 Vent. 918.

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in his note in *Chester v. Willan* (a), that *Hore v. Dix* and *Samon v. Jones* are in effect overruled by this decision.

It is true that in most, indeed, I believe, all, of the cases, there has either been a grant *to the relation* without the intervention of trustees, *or* there has been a covenant that the *relations* should hold and enjoy; but it is clear that the decisions have not proceeded on the ground that one of those were essential. In the cases of *Doe v. Salkeld* and *Roe v. Tranmarr*, in which there was such a covenant, Lord Chief Justice *Willes* mentions its existence; but it is evident he does not rely upon it as necessary to the judgment. And in the case of *Thorne v. Thorne* (b), Lord Keeper *North* decided expressly, and without difficulty, that the grant to trustees to stand seised to the use of three brothers in consideration of blood, worked as a covenant to stand seised; and the express covenant that the *cestui que* trust should enjoy was not taken notice of; and the report is confirmed, as we were informed by Mr. *Wilson* in the course of the argument, by a reference to the Register's book. This case is an authority precisely in point, and is so much in unison with the more liberal spirit and sound reason of the more modern decisions on this subject, that we do not hesitate to abide by it.

The rule must therefore be absolute to enter a nonsuit.

Rule absolute to enter a nonsuit (c).

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| (a) 2 Saund. 97, a. | of a marriage by words <i>in presenti</i> |
| (b) 1 Vernon, 141. | were held to operate as a covenant |
| (c) In <i>Doe v. Williams</i> , 5 B. & Ad. 783, articles in contemplation | to stand seised. |

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CASE.—The declaration stated, that whereas one George Langridge, the father of the plaintiff, on the 1st of June, 1833, at the request of the defendant, bargained with him to buy of him a certain gun, to wit, for the use of himself and his sons, at and for a certain price, to wit, the sum of 24*l.*, and the defendant then, by falsely and fraudulently warranting the said gun to have been made by Nock, and to be a good, safe, and secure gun, then sold the said gun to the said George Langridge, for the use of himself and his sons, for the said sum of 24*l.* then paid by the said George Langridge to the defendant for the same: whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the said gun, at the time of the said warranty and sale, was not made by Nock, nor was it a good, safe, and secure gun, but, on the contrary thereof, was made and constructed by a maker very inferior as a gun-maker to Nock, and was then and at all times a very bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound and of very inferior materials; of all which premises the defendant, at the time of the making of the said warranty, and of the said sale, had full knowledge and notice. And the plaintiff in fact says, that he, knowing and confiding in the said warranty, did use and employ the said gun, which but for the said warranty he would not have done: and that afterwards, to wit, on

In case, the declaration stated, that L., the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, for the use of himself and his sons; and the defendant then, by falsely and fraudulently warranting the gun to have been made by N., and to be a good, safe, and secure gun, then sold the gun to L., for the use of himself and his sons, for 24*l.*; whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the gun was not made by N., nor was a good, safe, and secure gun, but on the contrary thereof, was made by a very inferior maker to N., and was a bad, unsafe, ill-manufactured and dangerous gun, and wholly unsound and of very inferior materials; of all which the defendant, at the time of such warranty and sale, had notice: and that the plaintiff, knowing and confiding in the said warranty, used the gun, which but for the warranty he would not have done; and that the gun being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded: whereby the plaintiff was greatly wounded, &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost the use of his hand:—*Held*, (after verdict for the plaintiff on the plea of not guilty, and on other pleas denying the warranty, and that the gun was unsafe, &c.), that the action was maintainable.

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the 10th December, 1835, the said gun being then in the hands and use of the plaintiff, by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, then and whilst the said gun was so in use by the plaintiff, burst and exploded, became shattered, and went to pieces; whereby and by reason whereof the plaintiff was greatly cut, wounded, maimed, &c. &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost, and is for ever deprived of the use of his hand, &c. &c.

Pleas, first, not guilty; secondly, that the defendant did not warrant the said gun to be made by Nock, and to be a good, safe, and secure gun, in manner and form, &c.; thirdly, that the gun was not a bad, unsafe, ill-manufactured, and dangerous gun, and wholly unsound, and of very inferior materials, as in the declaration alleged; fourthly, that the gun did not by reason and wholly in consequence of the weak, dangerous, and insufficient and unworkmanlike manufacture, construction, and materials thereof, burst, &c., as in the declaration alleged:—on all which issues were joined.

At the trial before *Alderson, B.*, at the Somersetshire Summer Assizes, 1836, it appeared that in June, 1833, the plaintiff's father saw in the shop of the defendant, a gun-maker in Bristol, a double-barrelled gun, to which was attached a ticket in these terms:—"Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty George IV.; cost 60 guineas: only 25 guineas." He went into the shop, and saw the defendant, and examined the gun. The defendant (according to Langridge's statement) said he would warrant the gun to have been made by Nock for King George IV., and that he could produce Nock's invoice. Langridge told the defendant he wanted the gun for the use of himself and

his sons, and desired him to send it to his house at Knowle, about two miles from Bristol, that they might see it tried. On the next day, accordingly, the defendant sent the gun to Langridge's house by his shopman, who also on that occasion warranted it to be made by Nock, and charged and fired it off several times. Langridge ultimately bought it of him for 24*l.*, and paid the price down. Langridge the father and his three sons used the gun occasionally; and in the month of December following, the plaintiff, his second son, having taken the gun into a field near his father's house to shoot some birds, putting in an ordinary charge, on firing off the second barrel, it exploded, and mutilated his left hand so severely as to render it necessary that it should be amputated. There was conflicting evidence as to the fact of the gun's being an insecure one, or of inferior workmanship. Mr. Nock, however, proved that it was not manufactured by him. The defendant also denied that any warranty had been given. The learned Judge left it to the jury to say, first, whether the defendant had warranted the gun to be made by Nock, and to be a safe and secure one; secondly, whether it was in fact unsafe or of inferior materials or workmanship, and exploded in consequence of being so; and thirdly, whether the defendant warranted it to be a safe gun, knowing that it was not so. The jury found a general verdict for the plaintiff, damages 400*l.*

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In Michaelmas Term, *Erle* moved in pursuance of leave reserved by the learned Judge, and obtained a rule nisi for a nonsuit, on the ground that no duty could result out of a mere private contract, the defendant being clothed with no official or professional character out of which a known duty could arise; and that the injury did not arise so immediately from the defendant's act as that it could form the subject of an action on the case by the plaintiff,

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Bompas, Serjt., and *Ball* shewed cause.—This declaration discloses a sufficient cause of action against the defendant. The object of the *action on the case*, given by the Statute of Westminster, was to meet every case of individual and particular wrong as it might arise, on the well-known principle that, if any subject sustained a wrong by the unjustifiable act of another, he ought to have a remedy. It is no objection, therefore, that this particular action may not have been brought. Nor is it material, after verdict, that the declaration may be informally drawn, if on the face of it a sufficient cause of action be disclosed. Although the contract is set out in the declaration, the action is not brought upon that contract, on which undoubtedly the son could not sue. But the action on the case is peculiarly applicable to cases where the party *cannot* sue on the contract, but where out of the breach of it a wrong has resulted to the plaintiff. The statement of the contract is merely introductory; it is however thus far important, that it shews the defendant had notice that Langridge the father bought the gun for the use of his sons: and it is alleged also, that the plaintiff knew of and confided in the warranty. In *Chapman v. Pickersgill* (a), where it was first held that case lay for maliciously suing out a commission of bankruptcy which was afterwards superseded, *Wilmot*, C. J., says—"It is said this action was never brought, and so it was said in *Ashby v. White*; I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined, for there is nothing in nature but may be an instrument of mischief." Here it is clear that if the plaintiff cannot sue for this injury, no other person can, and there

(a) 2 Wils. 145.

is a wrong without a remedy. But the principle on which it is contended that this action may be supported, is, that wherever by the circumstances of the transaction a duty is imposed upon the defendant, and by a breach of that duty (as distinguished from a contract) an injury happens to the plaintiff, he may sue. This duty may either arise out of a contract, or it may be imposed by law: and the present case may be rested on both these grounds. [It should be observed, that it does not follow that because a contract exists, an action of tort may not be maintained even by the party to the contract.] Thus, in *Mast v. Goodson* (a), a count on an agreement in writing, that the plaintiff should build a yard in the defendant's close, and lay out 20*l.* upon it, and that the plaintiff should enjoy it for his life, averred that the plaintiff did build the yard, &c., and enjoyed the same for some years as an easement, and assigned for breach that the defendant wrongfully and injuriously obstructed him in the enjoyment of such easement: and this was held to be a good count in tort, and well joined with a count in trover. There the plaintiff might have sued directly on the contract; yet he was held entitled to sue in tort for a breach of the duty arising out of it. In *Everard v. Hopkins* (b), the declaration stated, that the defendant being a common surgeon, had undertaken the cure of the plaintiff's servant, being hurt with a cart wheel, and that by agreement between them, he was to have five marks for the said cure; and alleged that he was not only careless of the cure, but applied unwholesome medicines, &c., whereby the plaintiff lost the service of his servant for a year: it was held, on demurrer, that this count was good; and it was also said, that the servant, though he could not sue upon the agreement, might have an action upon the case for the applying of unwholesome medicines to him. So, in an

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(a) 3 Wils. 348.

(b) 2 Bulstr. 332.

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action on the case by a man and his wife against a surgeon for an injury to the wife by reason of the defendant's improper and unskilful treatment, it was held sufficient to state in the declaration that the defendant was retained as a surgeon for reward, and entered on the cure, without alleging *by whom* he was retained, or was to be paid: *Pippin and Wife v. Sheppard* (a). *Richards*, C. B., there says:—"From the necessity of the thing, the only person who can properly sustain an action for damages for an injury done to the person of the patient, is the patient himself, for damages could not be given on that account to any other person, although the surgeon may have been retained and employed by him to undertake the cure. The party employing the surgeon can have nothing to do with this action." So here, the father could recover only for the breach of the contract, and nothing for the injury to his son, except so far as he might be able to shew a loss of his services. In *Vin. Abr.*, Actions, (Case, Disceit), O. b, 2, this case is put, which is also referred to in *Everard v. Hopkins*:—"If I deliver my horse to a smith to shoe, and he deliver him to another smith, who pricks him, I may have action upon the case against him, though I did not deliver the horse to him:"—citing 12 E. 4, 13 a, pl. 9. Another case there stated is, where a party delivers goods to A., who delivers them to B. to keep for his use, and B. wastes them; the owner may have an action on the case against B., though he did not deliver them to him. In these cases the only *contract* was with the original bailee; yet an action on the case was held maintainable against the second.

But, in the second place, a duty was imposed *by law* on the defendant, not knowingly to sell an article calculated to do injury. Where a party undertakes to furnish that which by his misconduct may become dangerous to another, he

(a) 11 Price, 400.

is bound in law to take reasonable care that it is so supplied as not to be injurious. The law imposes such a duty, though there may be no *contract* at all. It is analagous to the liability of a party who puts dangerous animals, knowing their disposition, into a place where they are likely to do injury; *Dixon v. Bell* (a). He who carelessly or wrongfully exposes another to danger by fire arms is in a like predicament. Suppose there were no contract in this case, and it appeared that the defendant had put the gun into the plaintiff's hand to fire it off, knowing it to be unsafe; can it be said that he would not be liable if any injury resulted? If a party sold a vicious dog under a representation that he was a quiet one, and being taken home by the buyer, he bit his child; would not the seller be liable for this injury? The law imposes on all persons who deal in dangerous commodities or instruments, an obligation that they should use reasonable care, much more that they should not supply them knowing them to be likely to cause injury. [*Parke, B.*, referred to *Williams v. East India Company* (b). *Alderson, B.*—There are many cases which establish that the act of an *unconscious agent* is the act of the party who sets him in motion. If your declaration had averred that the father was an unconscious agent in the transaction, that is, that he believed the gun to be safe, it would have brought you within that principle]. It is averred that it was delivered to the father, for the use of the sons, on an undertaking from the defendant that it was a safe one; as against him, therefore, it is not necessary to shew that the father believed it to be so; at all events, after verdict, the allegation is sufficient. Suppose A. sells oxalic acid as Epsom salts; B., discovering the error, puts it back, and goes to inform A. of it; in the mean time C. takes it; would B.'s knowledge affect C.'s right of action against A.? [*Alder-*

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(a) 5 M. & Sel. 198.

(b) 3 East, 192.

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son, B.—It is averred that the injury arose wholly by the breach of duty of the defendant; that negatives the inference that it was in any degree by breach of duty in the father]. The onus is on the defendant to shew that the plaintiff is not entitled to recover: *prima facie*, every man who suffers an injury is entitled to recover against the party who caused it, and who must be taken to have intended the natural consequences of his injurious act.

Eyle and Butt, contra.—There is no such known right in the English law as is contended for on the other side, whereby the plaintiff is entitled to receive damages from the defendant, with whom he made no contract. The allegation, that the gun was delivered for the use of the sons, is not a direct and traversable allegation; it is laid under a *videlicet*, and is wholly immaterial. If the contract had been denied, it would have been sufficient to prove a contract in fact, without proving the statement that the gun was bought for the sons' use. The introduction of that allegation, therefore, cannot affect the defendant's legal liability. At all events, the declaration should have shewn that it was bought for the use of the sons in some lawful and necessary employment,—as in the service of the father,—and so used; as it stands, it must be taken that the plaintiff used it merely for his amusement, and without the father's authority. It is consistent with all that is stated, that the plaintiff, having heard of the warranty, and having become aware of the unsafe state of the gun, may have taken it from its place of custody, and of his own act loaded and fired it off, when it exploded. All these presumptions ought to have been excluded, in order to give the plaintiff a right of action. The *special damage* can give no cause of action, if no breach of duty be shewn down to that point. The plaintiff must shew a breach of a public duty, or a violation of a private right existing between himself and the defendant,—and then

follows the damage, which completes the cause of action; but the damage cannot be prayed in aid to support the previous part of the case: and here it is in the statement of the special damage that it is said the injury was caused by the breach of duty and improper conduct of the defendant. No doubt, whenever an instrument is *immediately* dangerous, and is so placed as to be likely to do an injury to any of the public, the party who places it there is liable for such injury. But here, for aught that appears, the gun was delivered to the father unloaded. And the contract of warranty raises no foundation of public duty: it is a mere representation at the time; and there is no authority that it was in breach of any public duty, or could have subjected the defendant to any public proceeding. In all the cases referred to on the other side, it was alleged as a fact, and is noticed by the Court, that the instrument was at the time actually dangerous. So also, in the cases relating to the setting of loaded spring guns, or other weapons directly dangerous. *Hott v. Wilkes* (a), *Bird v. Holbrook* (b), *Townsend v. Wathen* (c). So, ferocious animals are immediately and necessarily dangerous. But there are other cases which may be put, more in analogy with the present. Suppose a chain cable were sold with a warranty of its being secure, when in fact it was imperfect, and the vessel being in a storm, the cable is let go, and breaks; could it be contended that the captain and each of the crew, if injured in consequence, would have a right of action against the seller? So, supposing the owner of an unruly horse, knowing his disposition, sold him with a warranty that he was quiet to drive, and the buyer lent him to a friend, who put other persons into the carriage, and he ran away, and overturned and injured them; would the seller be liable to

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(a) 3 B. & Ald. 308.

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(b) 4 Ring. 628; 1 Moo. & P.

(c) 9 East, 277.

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each of these persons?—Such liabilities would be carried to an extent wholly indefinite. The distinction is this: is the instrument or other thing immediately dangerous or mischievous by the act of the defendant, or is it such as may become so by some further act to be done to it? Thus, in the well known case of *Scott v. Shepherd* (a), the squib was immediately dangerous, and the injury done by it furnished a right of action. So there is a known head of actions for negligence “in keeping his fire;” Com. Dig. Action upon the case for negligence, (A. 6); because fire is a known immediate cause of mischief. The nearest case to the present is that of *Witte v. Hague* (b). There, A., an engineer, having been employed by B. to erect a steam boiler and other apparatus on premises adjoining to the manufactory of C., and C.’s property having been injured in consequence of the explosion of the boiler by reason of the insufficiency of the materials of which it was composed; and it being found as a fact by the jury that A. was personally present, and that his servants had the management of the apparatus, at the time of the accident, it was held that C. might maintain an action on the case against A. for the injury; but the Court intimated an opinion, that if the jury had negatived the fact of A.’s management of the apparatus, though the accident arose from the imperfection of the materials, he would not have been primarily liable. The general principle is, that the damage must be a proximate consequence from the act of the defendant:—here no privity is shewn between the defendant and the plaintiff, and the gun is made to produce the damage by the spontaneous and unauthorized act of the plaintiff. [*Parke, B.*—The question is, whether a person to whom the representation of the defendant is indirectly made, may not also bring an action. Suppose it be made to the one in order to be communicated to the other?] Then it ought

(a) 3 Wils. 403.

(b) 2 Dowl. & Ry. 38.

to be so averred. [*Parke, B.*—May not that be collected from the allegations in this declaration?] There is no statement that the representation was made by the defendant to the plaintiff, or that it was conveyed to him by his father, or that the father was an intermediate agent for the purpose of conveying it. If the defendant had authorized the father to make the representation to the plaintiff, it might and ought to have been averred that the defendant so represented to the plaintiff: but all that is alleged is, that the father, at the time of the sale, told the defendant it was for the use of himself and his sons. It is just the same as the case of the purchaser of a horse for himself and his friends, or of a stage coach for the use of the proprietors and all the passengers. In the cases cited on the other side, of *Everard v. Hopkins*, and *Pippin v. Shephard*, there was a direct act of misfeasance done by the defendant to the plaintiff. So, in *Williams v. East India Company*, the action was between the parties to the contract. *Scott v. Lara (a)*, *Ward v. Weeks (b)*, *Vicars v. Wilcocks (c)*, are authorities to shew that, in order to support an action for a false representation, the injury must be the natural and legal consequence of the false statement of the defendant.

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Cur. adv. vult.

In the present term, the judgment of the Court was delivered by

PARKE, B.—In this case a motion was made to arrest the judgment, after a verdict for the plaintiff. [His Lordship stated the declaration, and proceeded]:—It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant. The father was the contract-

(a) Peake's N. P. C. 296. (b) 7 Bingham 211. (c) 8 East, 1.

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ing party with the defendant, and can alone sue upon that contract for the breach of it.

The question then is, whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported.

We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instrumenta and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground. If the instrument in question, which is not of itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been *simply* delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the defendant to the plaintiff, for the purpose of being so used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an

action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman* (a); which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have had his remedy for the deceit; nor could it make any difference that the third person *also* was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view *that the plaintiff should use the instrument* in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.

If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have found by the jury bring this case within the principle of those referred to. The defendant has knowingly sold the gun to the father, *for the purpose of being used by the plaintiff* by loading and discharging it, and has knowingly made a false warranty that it might be safely done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true, (for this is

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(a) 3 T. R. 51.

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the meaning of the term *confiding*), used the gun, and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. The delivery of the gun to the father is not, indeed, averred, but it is stated that, by the act of the defendant, the property was transferred to the father, *in order* that the son might use it; and we must intend that the plaintiff took the gun with the father's consent, either from his possession or the defendant's; for we are to presume that the plaintiff acted lawfully, and was not a trespasser, unless the contrary appear.

We therefore think, that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased.

Rule discharged.

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LEVY v. PRICE.

IN this case a writ of error coram vobis was sued out on the 17th of February last, and notice thereof was given to the plaintiff's attorney on the 22nd; on the 19th April it was allowed, but on that same day, at an earlier hour, the plaintiff levied on the defendant's goods under a fieri facias.

The new rules of H. T. 2 W. 4, s. 83, and H. T. 4 W. 4, s. 9, do not apply to errors in fact; a writ of error coram vobis is therefore a supersedeas from the time of notice that it is sued out, not from the time of allowance only. The 6 G. 4, c. 96, s. 1, requiring bail in error, does not apply to errors in fact.

Mansel had obtained a rule to set aside the fieri facias for irregularity, and to stay the proceedings on the judgment, and referred to *Birch v. Triste* (a) as an authority that a writ of error coram vobis was not within the statutes requiring bail in error.

Humfrey shewed cause.—Under the rules of H. T. 2 W. 4, s. 83, and H. T. 4 W. 4, s. 9, the writ of error was a supersedeas only from the time of allowance, not from the time of notice; and under the 6 Geo. 4, c. 96, s. 1, the defendant ought to have put in bail in error.

PARKE, B.—*Birch v. Triste* is a distinct authority that the statute of James does not apply to errors in fact; and the 6 Geo. 4 is in pari materiâ with it. Nor do the new rules apply to the case of errors in fact. The plaintiff ought therefore to have applied to the Court for leave to take out execution: and the rule must be absolute.

Rule absolute; no action to be brought.

(a) 8 East, 411.

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BEALE v. OVERTON.

The sheriff must apply to the Court under the Interpleader Act, in the term next after the claim is made, and soon enough to enable the other parties to shew cause in that term. If he does not, either the rule will be discharged, or he must pay the costs of both of the other parties.

THIS was a sheriff's interpleader rule. *Willmore*, for the claimant, objected that the sheriff came too late. It appeared that he went into possession on the 25th November; shortly afterwards he received notice that the property on the premises belonged to a trustee under the marriage settlement of the defendant's wife, but he nevertheless remained in possession until the 28th January, when he applied to the Court. The statement on the part of the sheriff was, that the rule had not been obtained sooner, in consequence of a defective statement in his affidavit. *Willmore* cited *Cook v. Allen* (a), and *Ridgway v. Fisher* (b), as authorities to shew that the sheriff was bound to apply much more promptly than he had done in this case.

Watson appeared for the execution creditor, and *Butt* for the sheriff.

PARKE, B.—The application is so late, that either the rule must be discharged, in which case the sheriff will be liable to an action, or he must pay the costs of both the other parties. He ought to come in the term next after the claim is made, in sufficient time to enable the other parties to shew cause in that term.

Rule accordingly.

(a) 1 C. & M. 542; 2 Dowl. P. C. 11. (b) 1 Har. & Woll. 189.

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LANMAN v. Lord AUDLEY.

DASENT moved for a rule calling upon the executors of the late Lord Audley to shew cause why judgment should not be entered up on a cognovit given by the testator. It appeared that the cognovit was dated on the 8th of February, 1833, and Lord Audley died on the 15th January, 1837. Before the recent rule of H. T. 4 W. 4, s. 3, if the application had been made to a judge in the vacation after the party died, to enter judgment as of the preceding term, it would have been in time. Archb. Pr. 383, 566. [Lord Abinger, C. B.—You might have moved in Hilary Term]. The plaintiff did not then know that Lord Audley was dead, and some time elapsed before he was able to ascertain whether he had made a will, and who were the executors, the will having been proved in Ireland. A similar application was made two years ago to the Court of King's Bench to enter up judgment on a warrant of attorney, in the case of *Harrison v. The Executors of Sir George Naylor*, and that Court granted a rule nisi, but no cause was shewn, the executors having paid the money. [Lord Abinger, C. B.—The old notion was, that as a term was one day, judgment might be entered up on any day of the term if the defendant was proved to be alive at any time within the term; but here the plaintiff does not come within the following term. This could not have been done under the old rules, and I do not see why it should be done now]. The Court are empowered by the proviso in Rule 3 of H. T. 4 W. 4, to order judgment to be entered up nunc pro tunc.

The proviso in rule 3 of H. T. 4 W. 4, "that it shall be competent for the Court or a Judge to order a judgment to be entered nunc pro tunc," applies only, as formerly, to cases where it is delayed by the act of the Court.

PARKE, B.—No; I apprehend the new rule for entering up judgment nunc pro tunc applies, as formerly, to the cases where the delay is only of the Court, as where a case has been argued, and some delay has arisen thereby. In

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The rest of the Court concurred.

Motion refused.

SMITH v. ANDREWS.

The warden of Dover Castle having returned cepi corpus to a writ of capias, a rule to bring in the body was served, which expired on the 28th of November. A notice of justification of bail was given on the 6th of December, which the plaintiff's attorney returned, saying that the body rule had expired, and the warden was in contempt. Two subsequent notices were given, and the plaintiff's attorney attended on each occasion, and after protesting that the proceedings were irregular, opposed the justification of bail:—*Held*, that this was no waiver of the warden's contempt, and that the plaintiff was afterwards in a condition to move for an attachment.

A WRIT of capias directed to the warden of Dover Castle was issued on the 30th of September, on which the defendant was arrested on the 8th of November, and gave a bail-bond on the 10th. The warden accordingly returned cepi corpus, and a rule to bring in the body was served on the 22nd, returnable on the 28th of November. Bail was put in on the 5th of December, and a notice of justification was given on the 6th, which the plaintiff's attorney returned, stating that the body rule had expired, and that the warden was fixed. A subsequent notice was given on the 17th to justify bail at chambers, which also the plaintiff's attorney returned, saying that the notice was irregular. He however attended at the judge's chambers, at the same time protesting that the proceedings were irregular, and opposed the bail, and one of them was rejected. A subsequent notice was given for the 5th of January, when the plaintiff's attorney again attended and protested against the proceedings as irregular, and applied for costs on the rejection of the bail on the former occasion. The bail were allowed to justify, and on the 6th a plea was delivered at the office of the plaintiff's attorney, which was never returned. On the 13th of January the warden was applied to for the payment of the debt and costs, and a bill of costs was delivered, which did not contain any mention of or charge for opposing the justification of bail; and the plaintiff's attorney did not communicate to the warden the fact that the bail had justified. The warden, under the threat of an attachment, paid the amount of debt and costs.

W. H. Watson on a former day in this term obtained a rule to shew cause why the plaintiff or his attorney should not pay over to the warden the amount of the debt and costs which he had so paid. Against this rule,

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Kelly now shewed cause.—The plaintiff was in a condition to move for an attachment at the time the money was paid by the warden; and the money was paid in lieu of and to prevent the attachment. The rule to bring in the body having expired on the 28th of November, and bail not having been put in, the warden was in contempt on the 29th, and liable to an attachment. The defendant had no power to put in bail in vacation without consent, and no consent was given; therefore the justification of bail was altogether irregular: *Sayers v. Tolfree* (a). Attending and opposing bail was no waiver, as the plaintiff's attorney protested at the time that the whole proceeding was irregular: *Hawkins v. Plomer* (b), *Holt v. Meddowcroft* (c). [*Parke, B.*—Was not the acceptance of the plea a waiver of the irregularity, and an admission that the defendant was then in Court?] Without considering how far the mere delivery of a plea and the non-return of it is a waiver of all past irregularities, there could be no waiver here, as the knowledge of the delivery of the plea is denied.

Watson, contra.—The delivery and non-return of the plea was an admission that the defendant was then in Court. Under the circumstances of this case, an attachment for not bringing in the body would have been irregular. In *Rex v. The Sheriff of Middlesex* (d), it was held that an attachment against the sheriff for not bringing in the body after the defendant had surrendered is irregular, though the surrender be not made until after

(a) 1 Price, 2.

(b) 2 Sir W. Black. 1064.

(c) 4 Mau. & Selw. 467.

(d) 2 Mau. & Selw. 562.

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the rule for bringing in the body has expired. The rule of H. T. 3 Will. 4, does not apply, as this was a rule to bring in the body, and not an order; it stands, therefore, on the old practice, and the case cited is a direct authority. If an application for an attachment had been made in this case, no attachment would have been granted, inasmuch as material facts were concealed from the warden, there having been no mention in the bill of costs of any item for opposing and searching for bail, which, if there had been, would have put the warden on the alert, and induced him not to pay the money.

PARKE, B.—The application is answered as to the irregularity, and I think the plaintiff was in a condition to move for an attachment at the time he obtained the amount of debt and costs from the warden; but the bill of costs should have contained items for searching for and opposing bail, and the costs of justifying; and then it is clear the warden would not have paid the money, but, if an attachment had issued, would have moved to set it aside on payment of costs. By the omission to insert this he has been misled. It is not clear from the affidavits that there was any acceptance of the plea. The rule cannot be granted on the terms prayed for, but it must be suspended, in order to give time for an application to be made on behalf of the defendant, that the bail may justify on an affidavit of merits. If no such application can be made, either on behalf of the bail or of the defendant, the plaintiff's attorney must receive all proper costs, to be taxed by the Master, out of the amount of the debt and costs paid by the warden, and refund the residue to the warden.

BOLLAND, B., and ALDERSON, B., concurred.

The affidavit of merits was afterwards supplied, and the rule was made absolute to repay the money to the warden on the above mentioned terms.

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HARRIS v. BUTLER.

CASE.—The first count of the declaration stated that before and at the making of the indenture of apprenticeship thereafter mentioned, to wit, on the 6th day of September, 1834, one Matilda Harris, then being the daughter and servant of the plaintiff, with the consent of the said plaintiff, became and was the apprentice of one Adeliza, then being the wife of the defendant, for a certain time, to wit, the term of two years, for the purpose of learning the art or business of a milliner and dress-maker, in consideration of a certain sum, to wit, the sum of 29*l.*, then paid by the said plaintiff to the said defendant in that behalf; and on the terms that the said Adeliza, with the consent of the said defendant, should find and provide the said Matilda, whilst she should be such apprentice, with meat and drink and lodging; and that the said plaintiff should find and provide his said daughter with suitable clothing and with other necessities during the said term. Nevertheless, the said defendant contriving, and wrongfully and unjustly intending, to injure and prejudice the said plaintiff, theretofore, to wit, on &c., and whilst the said Matilda was such apprentice of the said Adeliza as aforesaid, debauched and carnally knew the said Matilda; whereby she became very sick and ill, and wholly incapable of serving the said Adeliza as such apprentice, or of learning the said art or business; and thereby the said plaintiff wholly lost the benefit which he ought to have derived and acquired from the said sum of money so paid by him as aforesaid, and from the said Matilda being taught and instructed in the said art and business; and also suffered and underwent great anxiety of mind by reason of the illness of his said daughter; and hath been forced and obliged to pay, lay out, and expend divers sums of money, &c., in and about the providing of

Case. The declaration stated that one M. H., being the daughter and servant of the plaintiff, with the consent of the plaintiff, became the apprentice of one A., the wife of the defendant, for the term of two years, for the purpose of learning the business of a milliner, in consideration of 29*l.* paid by the plaintiff, and in consideration that the said A., with the consent of the defendant, should find and provide the said M. with meat, drink, and lodging; nevertheless, the defendant debauched her, whereby she became ill, and incapable of serving the said A., and of learning the said business, &c. &c.:—*Held* bad on demurrer.

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physic and medicine, and the nursing and taking care of, and endeavours to cure the said Matilda Harris, and taking care of her during her said illness, &c.; and had wholly lost the benefit of the service of the said Matilda Harris, so being his daughter and servant as aforesaid, in his necessary affairs and business. The second count stated that the plaintiff, at the request of the defendant, suffered and permitted the said Matilda Harris, then being the daughter and servant of the said plaintiff, and an infant, to wit, of the age of sixteen years, and accustomed to be employed by the plaintiff in his affairs and business, to go and reside in the house of the defendant, and to be furnished with board and lodging there for the purpose of being taught and instructed in the business of a milliner by the said Adeliza, then being the wife of the defendant, for certain consideration and reward therefore paid by the plaintiff to the said defendant; and thereupon it became and was the duty of the defendant to take due and proper care of the said Matilda Harris, being the daughter and servant of the plaintiff, and of her morals and health, whilst she should remain in the house of the said defendant, so that the said plaintiff might not be injured or prejudiced by reason of the improper treatment by the defendant of the said daughter and servant of the plaintiff. Nevertheless, the defendant, contriving, &c., theretofore, to wit, on the day and year aforesaid, and on divers other days and times &c., whilst the said Matilda Harris was residing in the house of the said defendant, and being furnished with board and lodging, and receiving instruction as aforesaid, debauched and carnally knew the said Matilda Harris, so being the daughter of the said plaintiff; whereby the said Matilda Harris became and was very ill, and incapable of continuing in the house of the said defendant, and being so taught and instructed as aforesaid; and it became and was necessary that the said Matilda Harris should be

removed from the house of the said defendant, where the said Matilda Harris was residing, and that the said plaintiff should receive her again into his house, and should supply her with board and lodging and necessaries, and should supply physic and medicine for the said Matilda Harris during her illness, whereby &c., (concluding as in the first count).

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Plea to each count, that the said Matilda Harris was not, at the said times when &c., the servant of the plaintiff.

Special demurrer, stating for causes that the defendant had, by his plea to the first count, alleged that the said Matilda Harris was not, at the said times when &c., the servant of the plaintiff; whereas it was not alleged in that count that the said Matilda Harris, at the time of the committal of the grievances in that count mentioned, was the servant of the plaintiff; nor was the declaration founded solely on the loss of the service of the said Matilda Harris, nor was it material or necessary to the support of it that the said Matilda Harris should have been such servant at the time of the committing of the grievances; and also that the pleas did not confess and avoid the allegations in the declaration, or traverse the same; and also that the pleas should have concluded to the country, and not with a verification.

Joinder in demurrer.

Hughes, in support of the demurrer.—This is not a common action for seduction, but a special action on the case, founded on a contract between the defendant and the plaintiff, by which, in consideration of a sum of money paid to the defendant, a benefit was to be derived by the plaintiff, not immediately but indirectly, and which, in consequence of the wrongful act of the defendant, the plaintiff has wholly lost. [*Parke*, B.—The declaration does not state that the defendant contracted. If you had gone upon the contract you should have declared in *assumpsit*].

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The rule that, to maintain an action for an injury of this nature, the parties must stand in the relation of master and servant at the time of the injury, applies only to actions per quod servitium amisit. The loss here is independent of the service. In *Hall v. Hollander* (a), *Bayley, J.*, suggested an action of this nature. He says, "In this case it was proved that the father did not necessarily incur any expense; if he had done so, I am not prepared to say that he could not have recovered upon a declaration describing as the cause of action the obligation of the father to incur that expense." In *Booth v. Charlton*, and *Johnson v. M'Adam*, cited in *Dean v. Peel* (b), *Wilson, J.*, is stated to have held at Nisi Prius, that where the daughter was under age, the action was maintainable, though she was not part of her father's family at the time she was seduced. In *Speight v. Oliviera* (c), where A., with intent to seduce the servant and daughter of B., hired her as his servant, and by that means obtained possession of her person, it was held that B. might maintain an action against A. for such seduction. [*Parke, B.*—There the wrong was done under colour of a contract, and the defendant's fraud did not destroy the original relationship between the father and the child. In the cases cited in *Dean v. Peel*, though the daughter was not at her father's house at the time, she was only casually absent on a visit, with an animus revertendi; and as Lord *Ellenborough* observed, "In those cases the implied relationship of master and servant continued." Formerly the action of seduction was held not to be maintainable without proof that the relationship of master and servant existed, and in all cases some service was held necessary. That rule was afterwards so far relaxed, that if the child was a minor, but of an age capable of acts of service, such service it

(a) 4 B. & C. 660.

(b) 5 East, 47.

(c) 2 Stark. N. P. C. 493.

was held might be presumed. Here the declaration admits that she was not in her father's service, for it states the injury to have been done whilst she was the apprentice of the defendant's wife, and whilst she was residing in his house. You do not shew on your declaration any contract by the defendant to take care of the daughter's morals, nor does the law imply any such promise to the father]. The declaration states that the plaintiff has paid to the defendant a sum of money for the instruction of his daughter, and for her board and lodging, and he is deprived of that advantage by the conduct of the defendant. [Lord *Abinger*, C. B.—Does it follow that she is not to have her board and lodging still? But suppose a man to take a lodging for his son or daughter, does the law imply a contract to take care of their morals? *Parke*, B.—There may be a duty arising out of the contract of apprenticeship, but you do not state such a contract between the defendant and the plaintiff. Neither do you shew any other facts from which a contract by the defendant to take care of the daughter's morals may be implied].

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LORD ABINGER, C. B.—If the declaration can be amended by stating anything from which a duty express or implied might arise, you may have leave to amend on payment of costs.

Leave to amend within a week, otherwise

Judgment for the defendant.

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If a patent be taken out for several inventions, which are claimed as improvements, and the jury find that one of them is not an improvement, the patent is altogether void.

Where it appeared that, a few months before the date of a patent for an improvement in paddle wheels, two pair of the wheels were made for the plaintiff (to whom the patent was afterwards assigned) by an engineer and his workmen at his own manufactory, under the directions of the patentee, and under an injunction of secrecy, the engineer being paid for them by the plaintiff; that, when finished, they were taken to pieces, packed up, and shipped for a foreign port, where, according to the plaintiff's directions, they were put together, and used (after the date of the patent) in

steam-boats belonging to a company of which the plaintiff was the manager and a principal shareholder:—*Held*, that this was not such a publication of the invention as to avoid the patent.

CASE for the infringement of a patent. The declaration stated, that one Elijah Galloway, before and at the time of the making of the letters patent, and of the committing of the grievances by the defendants as thereafter mentioned, was the true and first inventor of certain improvements in steam-engines, and in machinery for propelling vessels, which improvements were applicable to other purposes; and thereupon his late Majesty, King George 4, by letters patent, dated 2nd July, 1829, (reciting as therein mentioned), gave and granted to the said E. Galloway, his executors, administrators, and assigns, his licence and authority that he and they, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he or they should at any time agree with, during the term of fourteen years therein expressed, should make, use, exercise, and vend his said invention, and enjoy the whole profit and advantage thereof within England and Wales, and in all his majesty's colonies and plantations abroad, &c. Provided always, and the said letters patent were upon this condition, that if at any time during the term thereby granted it should be made appear that the grant was contrary to law, or prejudicial or inconvenient to his Majesty's subjects in general, or that the said invention was not a new invention *as to the public use and exercise thereof in England*, and in his Majesty's colonies and plantations abroad, or not invented and found out by the said E. Galloway, the letters patent should forthwith cease, determine, and be void. The declaration, after setting forth the whole of the letters patent, proceeded to allege the making and enrolment of the specification by Galloway, the patentee, an assignment

from him to the plaintiff, dated 16th October, 1829, and an infringement of the patent by the defendants, by an imitation of, and additions and alterations in, that part of the invention which consisted in machinery for propelling vessels. The defendants pleaded, first, not guilty; secondly, that the said E. Galloway did not by an instrument in writing particularly describe and ascertain the nature of his said alleged invention, and in what manner the same was to be performed, in manner and form as in the declaration alleged; thirdly, that the alleged invention in the declaration mentioned was not an improvement in steam-engines; fourthly, that it was not an improvement in machinery for propelling vessels; fifthly, that the alleged invention was not, at the time when the letters patent were granted, new, and that the said E. Galloway was not the true and first inventor thereof; and sixthly, that the alleged invention was and is of no use, benefit, or advantage to the public whatsoever: on all which pleas issues were joined.

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The specification enrolled by Galloway, the patentee, described the improvement in steam-engines to consist in a mode of giving a rotatory motion to the fly-wheel by means of an alternating motion produced by the rotatory: and the improvement in machinery for propelling vessels to consist of an improvement in paddle-wheels, whereby the float boards or paddles are made to enter and come out of the water at positions the best adapted, as far as experiments have determined the angle, for giving full effect to the power applied. And at the end of the specification, after having described the manner in which the machinery worked, he said—"My claim is for the mode hereinbefore described of giving the *required angle* to the paddles by means of the rods, stems," &c. &c.

At the trial before *Alderson, B.*, at the London Sittings after Trinity Term, 1836, the following evidence was given as to the question whether there was a publication of the invention before the date of the patent:—In

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the month of February, 1829, one Curtis, a machine-maker at Bermondsey, began to make for Morgan, the plaintiff, in his, Curtis's, manufactory, two pair of paddle-wheels, on the principle for which the patent was afterwards taken out; receiving his instructions from time to time from Galloway. One pair was completed in April, and the other in June, 1829, and Curtis was then paid for them by the plaintiff. Curtis's ordinary workmen were employed upon them, but he received directions from Galloway that no other person should see them, as he was about to take out a patent. One Williams, a working mechanic, came on one occasion into the manufactory when the men were at work upon the wheels, and saw them, but a complaint being made on the subject, he was never again admitted, nor were they seen, so far as appeared in evidence, by any other stranger. When the wheels were finished, they were taken to pieces and packed in boxes, and shipped for Trieste, where they arrived in July, and were received by an agent of the plaintiff: from thence they were embarked for Venice, where they were put together, and in September they were started from Venice to Trieste, in boats belonging to the Venice and Trieste Steam Company, of which the plaintiff was the manager and a principal owner. The instructions for entering the caveat for the patent were given in the beginning of March, and it was taken out on the 2nd July.

The learned Judge expressed his opinion that, on these facts, the defendants were entitled to a verdict on the fifth issue, and accordingly so directed the jury, giving the plaintiff leave to move to enter a verdict for him on that issue, if the Court should be of a contrary opinion. The great mass of the evidence given in the cause was directed to the questions, whether the plaintiff's invention as to the steam-engines was of any use, and whether the specification sufficiently described the invention in the

paddle-wheels, so as to enable a workman of ordinary and competent skill and knowledge to construct them, and to obtain the *required angle*. The jury ultimately found on the several issues as follows: on the first, second, and fourth, for the plaintiff; and on the third for the defendants; and the sixth issue was thereupon also entered for the defendants.

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In Michaelmas Term, Sir *F. Pollock* moved pursuant to the leave reserved, and obtained a rule to shew cause why the verdict should not be entered for the plaintiff on the fifth issue (a), and also why the plaintiff should not have judgment non obstante veredicto on the third issue, and the sixth issue should not be entered for him, on the ground that the inutility of one part of the invention could not vitiate the patent as to the whole; citing *Brunton v. Hawkes* (b), *Lewis v. Marling* (c), and *Haworth v. Hardcastle* (d). The *Attorney-General*, for the defendants, also obtained a rule nisi for a new trial, on the ground that the verdict on the second issue was contrary to the evidence. In Hilary Term,

The *Attorney-General*, *D. Pollock*, *Alexander*, and *Jervis*, shewed cause against Sir *F. Pollock's* rule.—If the third issue be a material one, having been found for the defendant, the finding on the other issues becomes immaterial. The question is, therefore, whether the *inutility* of an invention, or a material part of it, which is claimed as an improvement, does or does not defeat the patent right. Now, the statute of the 21 Jac. 1. c. 3, was in all respects a *restraining* statute. Lord Coke, in his commentary upon it (e), states that, at common law, there

(a) On this point he produced affidavits of the plaintiff and others, explanatory of the evidence given at the trial; but as the Court, in giving judgment, did not act upon them, it seems to be unnecessary to refer to them.

(b) 4 B. & Ald. 541.

(c) 10 B. & Cr. 22; 5 Man. & R. 66.

(d) 1 Bing. N. C. 182; 4 M. & Scott, 720.

(e) 3 Inst. 184.

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must be, in order to support a monopoly, “urgens necessitas et evidens utilitas.” And there is nothing in the statute to invest the Crown with a larger power than it possessed at common law. The grant itself also recites that the party is the inventor of an *improvement*: the plea denies that it is an improvement, so far as the plaintiff claims it as to steam-engines; the jury have found that it is not so; the patent is therefore void as to this part, inasmuch as the Crown has been deceived in its grant, having made it on the faith of the suggestion that the machine was an improvement in steam-engines. And if void for that part, it is void altogether: the claim is for *one entire invention*; and if a party takes out a patent for several subjects, he perils the whole on the validity of each; *Brunton v. Hawkes* (a). A patent for a useless manufacture is “hurtful” and “inconvenient,” within the meaning of the statute; since it precludes all the rest of the public from enjoying the benefit of real improvements in the subject-matter of the patent during the term of the exclusive grant. A review of the authorities on the subject leads to the same conclusion. In *Edgeberry v. Stephens* (b), it is said that “the act intended to encourage new devices *useful* to the kingdom, whether learned by travel or study;” and therefore it was held that a patent might be granted for an invention new in England, though it had been before practised beyond sea. In *Boulton v. Bull* (c), Eyre, C. J., says of the invention which was there the subject of discussion (Boulton and Watt’s method of lessening the consumption of steam)—“It professes to lessen the consumption; and to make the patent good, the method must be capable of lessening the consumption to such an extent *as to make the invention useful*.” In *R. v. Arkwright* (d), Buller, J., says:—“What is there in the specification that can lead you to

(a) 4 B. & Ald. 541.

(b) 2 Salk. 447.

(c) 2 H. Bl. 498.

(d) Davies’s Patent Cases, 118.

say you must make use of three things for one of the machines, and three for the other, and which three for one or the other? And even if it were so, what is to become of the other four? If those are of no use but to be thrown in merely to puzzle, I have no difficulty to say, upon that ground alone, the patent is void." So, in *Huddart v. Grimshaw* (a), Lord Ellenborough says:—"If the combination in its nature be essentially new; if it be productive of a new end, and *beneficial to the public*, it is that species of invention which, protected by the king's patent, ought to continue to the person the sole right of vending it." In *Manton v. Parker* (b), and again in *Bovill v. Moore* (c), Gibbs, C. J., lays it down expressly, that in order to support a right to the exclusive enjoyment of any invention, the party must shew "not only that it is new, but that it is useful to the public." *Walker v. Congreve* (d) carries the principle still further: there Leach, V. C., said that the particular invention, though new, was not of such a nature as to come within the statute, for that it did not exhibit such proof of *skill* and invention as entitled it to the protection of the law. In *Hill v. Thompson* (e), Dallas, J., having directed the jury that the law on the subject of patents required, first, that the invention must be novel; secondly, that it must be useful; and, thirdly, that the specification must be intelligible; that direction was expressly adopted and acquiesced in by Lord Eldon (f). In *Bloxam v. Elsee* (g), and *Lewis v. Davis* (h), Lord Tenterden also left it as a distinct point to the jury whether the invention was useful; and such has been the uniform course at nisi prius. In *Haworth v. Hardcastle* (i),

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| (a) Dav. Patent Cases, 279. | (f) 3 Meriv. 629. |
| (b) Id. 330. | (g) 1 Car. & P. 565; Ry. & M. 187. |
| (c) Id. 399. | (h) 3 Car. & P. 502. |
| (d) Gods. Patent Laws, 68, n. | (i) 1 Bing. N. C. 182; 4 M. & Scott, 720. |
| (e) 8 Taunt. 375; 2 Moore, 424; S. C. 3 Meriv. 622. | |

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where the jury found that the invention (certain machinery for drying calicoes) was new, and useful on the whole, but that it was not useful *in some cases* for taking up the cloth (it being stated in the specification that the cloth might be taken up again, by the same machinery, after having been extended for the purpose of drying), the Court undoubtedly sustained a verdict in favour of the patent. That case, however, is distinguishable; for the Court expressly decided on the ground that the jury had not negatived or intended to negative that the patent was useful, in the generality of cases, for the purposes stated.

The case on which the plaintiff will place the greatest reliance, is that of *Lewis v. Marling* (a). There the patentee of an improved machine for shearing cloths, claimed as his invention "the application of a proper substance to brush the surface of the cloth to be shorn:" the brush, however, turned out to be useless; but it was held that this did not vitiate the patent, because the specification had not described it as an *essential* part of the machine. [*Alderson, B.*—There may be a great difference between the case of a complicated machine, one part of which may be useless, and a case where one of the distinct portions of an invention is useless]. *Lewis v. Marling* is, on that ground, clearly distinguishable from the present case. But besides, the patentee has here explicitly claimed this as an *improvement* in steam-engines. That amounts to the same as if, in describing a complicated machine, he had claimed any particular part of it as an essential part. On this ground, therefore, it is submitted that the patent is void altogether.

The second question is as to the *novelty* of the invention. The rule of law is, that if, after a party has completed his invention, and before taking out his patent, he thinks fit to put it into use or practice, that will avoid his

(a) 10 B. & Cr. 22; 5 M. & Ry. 66.

exclusive right. The nature of the use must have been such as would invalidate a patent for the same invention, if taken out by another person. *Tennant's case* (a), *R. v. Arkwright, Brunton v. Hawkes, Wood v. Zimmer* (b). Here the facts shew that there was such a use and exercise of the invention as amounted to a publication. It is said that all that was done by the plaintiff was for the purpose of experiment. It rather appears that it was by way of *venture*. The wheels were sent to Trieste by the plaintiff, not as the patentee, but as the agent of the company, in order that the company might purchase them, not merely that they might try the capability of the invention: and the patent was taken out within a month or two afterwards, before any answer was returned from Trieste. The *new manufacture* intended by the statute is something which, at the time when the patent is taken out, has not been *known* to others than the patentee; the restriction is not confined to cases where it has been previously vended, or even used, in the ordinary sense of the word. The previous *knowledge*, and the *use* thereby acquired, is a publication sufficient to avoid the patent. If these wheels, when completed, had been publicly exhibited, could the patent have been sustained? By such exhibition, the invention would have ceased to be *new*, although it had never been brought into actual exercise.

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Sir *F. Pollock*, Sir *W. Follett*, and *Butt*, in support of the rule.—First, the plaintiff is entitled to a verdict on the fifth issue. Upon the evidence given at the trial, there was nothing to go to the jury to shew such a want of novelty as avoided the patent, either by force of the statute or by the terms of the grant. The requisite of *novelty* in an invention was a restriction first introduced by the statute of James. [*Parke*, B.—That appears ques-

(a) *Davies's Patent Cases*, 429.

(b) *Holt's N. P. C.* 58.

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tionable: Lord Coke seems to speak of it as one of those requisites of a monopoly which existed before the statute]. It is submitted that he is only commenting upon the several restrictions imposed by the statute itself. Then, all which the statute requires in this respect is, that the grant shall be "to the first and true inventors of such manufactures which others at the time of the making of the grant did not *use*." And all that the letters patent themselves require, is, that the invention shall be new as to the public *use and exercise thereof* in England or the colonies. Now, it does not appear from the evidence that there was any *use* whatever of this invention, in the ordinary sense of the word, in England. The machine itself was never used: and if the invention be considered to be not the machine, but the method of constructing it, that was brought into use only on one specific occasion, and that only by way of experiment, and with the view of using the machine itself out of the kingdom. It has been said on the other side, that it could not have been by way of experiment, because the shipment of the machines abroad was made only a month or two before the date of the patent. But the period of six months which is given after the date of the patent, for enrolling the specification, is given for the very purpose that the patentee, having secured his right, may have an interval in which to perfect his experiments, before he is obliged to describe or ascertain by his specification the precise nature and details of his invention. Nay, he is even *bound*, if during that interval he make any further discovery, to communicate it to the public; *Crossley v. Beverly* (a). Suppose the machines had been made by the plaintiff himself, and then sold to the company: would that have been a publication? Clearly not. Then he has an equal right to employ another to make them; he does not sell to that other the privilege

(a) 9 B. & Cr. 63.

of making them for himself, but merely employs him to construct them, paying him the price of the materials and labour. Moreover, he is employed with a knowledge that a patent is about to be taken out, and therefore that the method of construction is a matter to be kept secret; and accordingly he is bound by a pledge of secrecy. It is in all respects the same as if the machine had been made by the plaintiff himself, in his own workshop, in a case where he could have made it by his own skill and labour. The plaintiff does not, by licence or otherwise, permit others than himself—strangers—to use either the machine or the method of construction in England: he does not sell or publish in any way the method of construction: and he sells the machine but to be used abroad. *The public* have, before the date of the patent, no means whatever of discovering the invention. As to Galloway's publication to the plaintiff, that was under the intended contract of assignment, and was clearly no publication to the world. The cases referred to on the other side are all distinguishable. In *Wood v. Zimmer*, the article for which the patent was granted had been publicly vended. In *Tennant's case*, it had been used for several years by another manufacturer; the patentee was therefore certainly not "the first and true inventor." The same observation applies to the case of Arkwright's patent. *Lewis v. Marling* was a stronger case than the present. [*Alderson, B.*—It is certainly a most important question, what are the limits of what a man may do without its being a publication, and a question on which much remains to be discovered: the law is in a very confused state. In the case of *Lewis v. Marling*, I should certainly have entertained very considerable doubts. If the question is to be put altogether on the ground of the public *use* of the invention, how did Dr. Brewster lose the benefit of his invention of the Kaleidoscope because it had been previously published in a book?

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It had not been *used*, though it was made known to all the world before. If Dr. Hall had published his discoveries in a book, I apprehend that would have put an end to Dollond's patent, although Dr. Hall had never made an object glass in his life. Much obscurity has been introduced into this question by the use of loose expressions and dicta]. The *knowledge* and *means of knowledge* of the public amount to the same thing: in this case the public had neither.

Secondly.—It may be admitted, that if a patent be taken out for a machine or thing which is to perform a particular operation, and it does not perform that, and is therefore *useless with reference to the specific purpose for which the patent is granted*, that will avoid the grant. But here it is not pretended that the plaintiff's steam engine is absolutely useless, or even worse to use than one of a different construction in the same circumstances: and there is a wide difference between the case of an article's not being useful because there is already another in the market which will as well answer the purpose, and may be cheaper, and that of an article which is useless because it professes to effect a particular purpose, and does not effect it. The cases relied on by the other side will be found to apply to the latter state of circumstances. It is said that, this being a patent for several inventions, by upholding one of them when the other is useless, the patentee obtains a monopoly of the whole, and so deprives the public of the benefit of applying the former to some other useful combination. But the answer is that which is given by the Court in *Lewis v. Marling*, that the statute imposes no such condition as that the invention shall be in all parts useful. "The condition is that the thing shall be new, not that it shall be useful; and although the question of its utility has been sometimes left to a jury, I think the condition imposed by the statute has been complied with when it has been proved to be new." Per *Parke, J.*, in

Lewis v. Marling (a). If the grant be according to the terms of the act of Parliament, and the grantee complies with any further condition which the Crown may think fit to annex to the grant, that is all that is necessary. And if this be true of a single invention composed of several parts, as was the case of *Lewis v. Marling*, à fortiori it is true of several distinct improvements comprised in one patent, where one only is found not to be useful. The restraint in the statute as to *general inconvenience* cannot apply to such a case; and the commentary of Lord Coke on that clause is, at the present day, absolutely absurd. The only question is, on what terms the grant is made; the Court cannot superadd any condition:—and good reason may be assigned why the statute should impose no condition of *utility*. Wherever a thing be *new* or not is a pure question of fact; but whether it be *useful* or not, with reference to previously existing things of the same kind, is a question of *opinion*, and a question admitting of all possible shades and degrees of difference. Here, for instance, it may be that this engine consumes so much more fuel than others of a different construction, that it is not therefore worth while to use it, although it may be abstractedly a certain improvement in the construction of steam engines. [Alderson, B.—The *Attorney-General* puts it thus:—if the invention be useless, its being a monopoly makes it *mischievous*, inasmuch as it prevents other persons from adding to it, so as to make a useful combination.] It might be for a jury to say whether, in such a case, the addition did not make it the invention of the supposed pirate. When a party obtains a patent, the presumption is that the Crown has looked at the invention, and found it a fit subject for a patent: if by matter ex post facto it appears that it stands in the way of a greater improvement, that may be ground of repeal; but usefulness

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is not made a *condition* of the grant, either by the statute or in the letters patent themselves. The public are not bound to adopt that part of the invention which is useless; but they are not entitled to reject that part, and at the same time to use the other as they please. But, at all events, the *whole* subject of the patent ought to be shewn to be useless, in order to avoid the grant. The infringer is bound to shew that the inventor has done the public *no* good. On principle, therefore, this point would appear to be against the defendants. But it is said the authorities, at least those antecedent to *Lewis v. Marling*, are in their favour. Although, however, it has been usual for judges to put the question of utility to the jury, there is no case which has decided that a defendant can avail himself of the non-utility of the invention as a distinct ground of defence. *Manton v. Parker* is the only case which bears the semblance of being an authority to that effect. But there the word *useful* plainly meant, useful for the particular purpose for which the patent was taken out: the case is certainly no authority that the plea of *no improvement* is a defence. The same observation applies to *Haworth v. Hardcastle*, *Boulton v. Bull*, and to the other cases cited from Davies. In *Hill v. Thompson*, as appears by the report of the case at law, the question of usefulness was not in fact left to the jury. *Huddart v. Grimshaw* was determined on the question of novelty. On the other hand, the authority of Lord Tenterden and Parke, J., in *Lewis v. Marling*, is directly in favour of the plaintiff.

Cur. adv. vult.

In the present term, the judgment of the Court was delivered by

PARKE, B.—[After stating the pleadings, his Lordship proceeded].—The first question in this case is, whether the verdict for the defendant on the fifth plea ought to be set aside, and a verdict entered for the plaintiff, pursuant

to the leave reserved by my Brother *Alderson*. Unless this question should be disposed of in favour of the plaintiff, it would be unnecessary to consider whether the plaintiff be entitled to judgment non obstante veredicto, on the third and sixth pleas; for if the verdict on the fifth plea were to remain undisturbed, that would be an answer to the action. The course which was taken with respect to this plea on the trial, was to ascertain the facts, upon which the learned judge gave his opinion in favour of the defendant, but at the same time reserved liberty to the plaintiff to move to enter a verdict in his favour, if the Court should be of opinion that the facts ought to have been left to the jury; that is, that they were such, that the jury might infer from them that there had been no use or publication of the invention, so as to destroy the novelty of the patent. The evidence was, that before the date of the patent (which was the 2nd of July, 1829), Curtis, an engineer, made for Morgan two pair of wheels upon the principle mentioned in the patent, at his own factory; Galloway, the patentee, gave the instructions to Curtis under an injunction of secrecy, because he was about to take out a patent. The wheels were completed and put together at Curtis's factory, but not shewn or exposed to the view of those who might happen to come there: after remaining a short time, the wheels were taken to pieces, packed up in cases, and shipped in the month of April on board a vessel in the Thames, and sent for the use of the Venice and Trieste Company, of which Morgan was managing director, and which carried on its transactions abroad, but had shareholders in England. Curtis deposed that "they were sold to the company," without saying by whom, which may mean that they were sold by Curtis to Morgan for the company; and Morgan paid Curtis for them. Morgan and Galloway employed an attorney, who entered a caveat against any patent on the 2nd of March, and afterwards solicited the patent in question, which was granted to Galloway and assigned to Morgan. Upon these facts, the

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question for us to decide is, whether the jury must have necessarily found for the defendant, or whether they might have found that this invention, at the date of the letters patent, was new in the legal sense of that word. The words of the statute are, that "grants are to be good of the sole working or making of any manner of new *manufacture*, to the first and true inventor or inventors of such manufactures, which others at the time of the making such grants did not *use*;" and the proviso in the patent in question, founded on the statute, is, that if the invention be not a new invention as to the *public use* and *exercise* thereof in England, the patent should be void. The word "*manufacture*" in the statute must be construed in one of two ways: it may mean the machine when completed, or the mode of constructing the machine. If it mean the former, undoubtedly there has been no use of the machine, as a machine, in England, either by the patentee himself, or any other person, nor indeed any use of the machine in a foreign country before the date of the patent. If the term "*manufacture*" be construed to be "the mode of constructing the machine," there has been no use or exercise of it in England, in any sense which can be called "*public*." The wheels were constructed under the direction of the inventor, by an engineer and his servants, with an injunction of secrecy, on the express ground that the inventor was about to take out a patent, and that injunction was observed: and this makes the case, so far, the same as if they had been constructed by the inventor's own hands, in his own private workshop, and no third person had seen them whilst in progress. The operation was disclosed, indeed, to Morgan, the plaintiff, but there is sufficient evidence that Morgan at that time was connected with the inventor, and designing to take a share of the patent. A disclosure of the nature of the invention to such a person, under such circumstances, must surely be deemed private and confidential. The only remaining circumstance is, that Morgan paid for the machines with the privity of Gal-

loway, on behalf of the Venice and Trieste Steam Company, of which he was the managing director; but there was no proof that he paid more than the price of the machines, as for ordinary work of that description; and the jury would also be well warranted in finding that he did so with the intention that the machine should be used abroad *only*, by this company, which, as it carried on its transactions in a foreign country, may be considered as a foreign company; and the question is, whether this solitary transaction, without any gain being proved to be derived thereby to the patentee or to the plaintiff, be a use or exercise in England, of the mode of construction, in any sense which can be deemed a use by others, or a public use, within the meaning of the statute and the patent. We think not. It must be admitted that if the patentee himself had before his patent constructed machines for sale, as an article of commerce, for gain to himself, and been in the practice of selling them publicly, that is, to any one of the public who would buy, the invention would not be *new* at the date of the patent. This was laid down in the case of *Wood v. Zimmer* (a), and appears to be founded on reason: for if the inventor could sell his invention, keeping the secret to himself, and, when it was likely to be discovered by another, take out a patent, he might have, practically, a monopoly for a much longer period than fourteen years. Nor are we prepared to say, that if such a sale was of articles that were only fit for a foreign market, or to be used abroad, it would make any difference; nor that a single instance of such a sale, as an article of commerce, to any one who chose to buy, might not be deemed the commencement of such a practice, and the *public use* of the invention, so as to defeat the patent. But we do not think that the patent is vacated on the ground of the want of novelty and the previous public use or exercise of it, by a single instance of a transaction such as this, between parties connected as Galloway and the plaintiff are, which is not like the case

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(a) Holt, N. P. C. 58.

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of a sale to any individual of the public who might wish to buy ; in which it does not appear that the patentee has sold the article, or is to derive any profit from the construction of his machine, nor that Morgan himself is ; and in which the pecuniary payment may be referred merely to an ordinary compensation for the labour and skill of the engineer actually employed in constructing the machine ; and the transaction might, upon the evidence, be no more in effect, than that Galloway's own servants had made the wheels, that Morgan had paid them for their labour, and afterwards sent them to be used by his own co-partners abroad. To hold this to be what is usually called a *publication* of the invention in England, would be to defeat a patent by much slighter circumstances than have yet been permitted to have that effect. We therefore think, that as the jury might, consistently with the evidence, have found this issue for the plaintiff, the verdict ought, pursuant to the leave reserved, to be entered on that issue for him.

The next question is, whether the plaintiff be entitled to judgment non obstante veredicto, or a replender, upon the finding on the issues on the 3rd and 6th pleas. The questions involved in these two issues are different. I propose to consider first, that on the 3rd plea. The suggestion in the letters patent is, that Galloway had invented certain improvements in steam-engines, and in machinery for propelling vessels, which improvements were applicable to other purposes ; and the patent is granted for the invention of those improvements. But unless the specification be referred to, to explain the title of the patent, it is doubtful whether the invention claimed is of improvements in steam engines, as connected with other machinery, only, or of improvements in steam-engines for whatever purpose they may be employed. Upon reference to the specification, there is no doubt that the claim is of the latter description ; but that instrument is not stated in the record, and upon what appears on the record, it is by no means clear that the patentee

does claim an improvement in steam-engines, unconnected with the machinery. And if he does not, the plea would probably have been bad on demurrer, as it is uncertain whether it does not deny the invention to be an improvement in steam-engines, unconnected with the machinery. But after verdict, this objection is removed: for it is a rule that if an issue could have been material, the Court, after verdict, ought to intend it to be so; *Kempe v. Crews* (a); and as the plaintiff did not demur, it must be taken that he admits that the plea is to be understood as denying the invention to be an improvement in steam-engines, in that sense in which it is used in the patent itself: and the jury must be intended so to have found. This brings me to the question, whether this patent, which suggests that certain inventions are *improvements*, is avoided if there be one which is not so. And upon the authorities we feel obliged to hold that the patent is void, upon the ground of fraud on the Crown, without entering into the question whether the utility of each and every part of the invention is essential to a patent, where such utility is not suggested in the patent itself as the ground of the grant. That a false suggestion of the grantee avoids an ordinary grant of lands or tenements from the Crown, is a maxim of the common law: and such a grant is void, not against the Crown merely, but in a suit against a third person; *Travell v. Carteret* (b), *Alcock v. Cooke* (c). It is on the same principle that a patent for two or more inventions, when one is not new, is void altogether, as was held in *Hill v. Thompson* (d), and *Brunton v. Hawkes* (e): for although the statute invalidates a patent for want of novelty, and consequently by force of the statute the patent would be void, so far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is, that the consideration for the grant is the no-

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(a) 1 Lord Raym. 187.

(b) 3 Lev. 135.

(c) 5 Bing. 340.

(d) 2 Moore, 242; 8 Taunt. 375.

(e) 4 B. & Ald. 542.

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velty of all, and the consideration failing, or, in other words, the Crown being deceived in its grant, the patent is void, and no action maintainable upon it. We cannot help seeing on the face of this patent, as set out in the record, that an *improvement* in steam engines is suggested by the patentee, and is part of the consideration for the grant: and we must reluctantly hold, that the patent is void, for the falsity of that suggestion. In the case of *Lewis v. Marling* (a), this view of the case, that the patent was void for a false suggestion, does not appear by the report to have been pressed on the attention of the Court, or been considered by it. The decision went upon the ground that the brush was not an essential part of the machine, and that want of utility did not vitiate the patent; and besides, the improvement by the introduction of the brush is not recited in the patent itself as one of the subjects of it, which may make a difference. We are therefore of opinion that the defendant is entitled to our judgment on the third issue. It is a satisfaction to know that this objection will not necessarily, in the present state of the law, destroy the patent, as the objection is one which will probably be removed by the Attorney-General under the 5 & 6 Will. 4, c. 83. This view of the case makes it unnecessary to consider the effect of the finding on the last issue, as amended by the judge's notes, that *part* of this invention is not useful, which is a different question from that which we have disposed of. A grant of a monopoly for an invention which is altogether useless may well be considered as "mischievous to the state, to the hurt of the trade, or generally inconvenient," within the meaning of the statute of Jac. 1, which requires, as a condition of the grant, that it should not be so, for no addition or improvement of such an invention could be made by any one during the continuance of the monopoly, without obliging the person making use of it to purchase the useless invention; and on a review of the cases, it may be doubted whether the question of utility is any-

(a) 10 B. & C. 22; 5 M. & Ry. 66.

thing more than a compendious mode, introduced in comparatively modern times, of deciding the question whether the patent be void under the statute of monopolies. And we do not mean to intimate any doubt as to the validity of a patent for an entire machine or subject which is, taken altogether, useful, though a part or parts may be useless; always supposing that such patent contains no false suggestion: nor do we pronounce any opinion upon the sufficiency of this plea in point of form. It may be that the proper form of plea is to use the words of the statute, and not to plead the want of utility; though it would probably be too late to take that objection in the present stage. The rule, therefore, must be absolute to enter a verdict for the plaintiff on the fifth plea, and discharged as to the residue.

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Rule accordingly.

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INFORMATION for legacy duties. The information stated that Samuel Malbon, heretofore, to wit, on the 19th

One S. M. by his will devised all his real estates, except his mortgages in fee, unto

W. V. and J. M., their heirs and assigns, to and upon the uses and trusts therein mentioned, viz. to the use of W. M. and his assigns for life, with remainder in tail to his issue, with divers remainders over. And the said S. M., the testator, by his will gave and devised all the residue of his personal estate (after payment of debts and legacies), as also all such real estates as he was seised of as mortgagee in fee, unto W. V. and W. M., their heirs, executors, administrators, and assigns, upon trust, to convert the whole of the said residue into money, and to lay out and invest the same, as soon as conveniently might be, in the purchase of real estate, to be conveyed to the said W. V. and J. M. (the trustees of his real estates), their heirs and assigns, to and upon the same uses and trusts as were thereinbefore declared of and concerning his real estates. And the testator thereby declared, that until such purchases were made, his said executors should place out or continue all the said residue at interest, in the names of his said executors, on mortgage of real estate; or, if the same should not offer, that the residue should be placed out at interest in the public funds, and the interest and dividends were directed to be paid to the persons to whom the rents and profits of the real estate therewith to be purchased would belong by virtue of his will. The testator appointed the said W. V. and W. M. his executors, and died in 1791, when they took upon themselves the execution of the will. The residue amounted to 14,000*l.*, and was invested in mortgage, in the names of the executors, before the year 1796, and before the act of 36 Geo. 3, c. 52; after which W. V. died, and W. M., who enjoyed the interest during his life, became the surviving executor. W. M. died without issue in 1825, and appointed W. H. and G. R. his executors. The money was never applied in the purchase of real estate; and W. H. and G. R., the executors under the will of W. M., on the 26th January, 1832, paid the residue of the personal estate of S. M. (the original testator) to J. M., he being the person entitled to it under S. M.'s will:—*Held*, that this was a legacy given by the will of a person dying before the 5th of April, 1805, and paid, satisfied, or discharged after the 31st day of August, 1815, within the meaning of the 55 Geo. 3, c. 184, and was liable to the payment of legacy duty under that act.

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of May, 1790, made his last will &c. in writing, and signed by him, and attested and subscribed in his presence by three credible witnesses, according to the form of the statute in that case made and provided, and thereby appointed Dr. Wm. Vivian and Dr. Wm. Malbon, then and therein called Dr. Wm. Gorst, executors of his said will: and also thereby, amongst other things, gave, devised, and bequeathed all the rest and residue of his goods and chattels and personal estate, from and after payment of his just debts, funeral and testamentary expenses, and certain legacies and annuities in the said will particularly mentioned, as also all such real estates as he was seised of as mortgagee in fee, unto his said executors, their heirs, executors, administrators, and assigns, upon trust to convert the whole of the said residue of his personal estate into money, and to lay out and invest the same as soon as conveniently might be in one or more purchase or purchases of freehold lands, tenements, or hereditaments in the said will mentioned and described, to be conveyed to the said Wm. Vivian and James Morrell, their heirs and assigns, to, for, and upon certain uses and trusts, and subject to certain provisos and powers in the said will particularly mentioned: and the said testator thereby directed that until such purchases were made his said executors should place out or continue all the said residue of his personal estate at interest, in the names of the said executors, on mortgage of real estate, or, if the same should not offer, that the said residue should be placed out at interest in the public funds, and that the clear yearly interest thereof should from time to time be paid to and received by such person or persons to whom the rents and profits of the real estate therewith to be purchased would for the time being belong by virtue of his said will: that the said testator afterwards, to wit, on the 30th of April, 1791, died without revoking or altering his said will as to the said bequests, or as to the said appointment of exe-

cutors; and that the said Wm. Vivian and Wm. Malbon afterwards, and after the death of the said Samuel Malbon, to wit, on the 6th of May, 1791, took upon themselves the burthen of the execution of the said will; and that afterwards, to wit, on the 1st of January, 1825, the said Wm. Vivian died, leaving the said Wm. Malbon him surviving; and that afterwards, and after the death of the said Wm. Vivian, to wit, on the day and year last aforesaid, the said Wm. Malbon made his last will and testament in writing, and thereby appointed Wm. Hancock and George Reade executors thereof; and that the said Wm. Malbon afterwards, and after the making of his said last will and testament, to wit, on the 11th of December, 1826, died without revoking or altering his said will as to the said appointment of executors; and that afterwards, and after the death of the said Wm. Malbon, to wit, on the day and year last aforesaid, the said Wm. Hancock and George Reade took upon themselves the burthen of the execution of the said wills of the said Samuel Malbon and Wm. Malbon respectively: that the said Wm. Hancock and George Reade having taken upon themselves the burthen of the execution as aforesaid, afterwards, and after the 31st of August, 1815, to wit, on the 26th of January, 1832, the said residue of the personal estate of the said Samuel Malbon, the just debts, funeral and testamentary expenses, and the said other legacies and annuities in the said will of the said Samuel Malbon mentioned, having been before then and there paid and satisfied, then and there was of great value, to wit, of the amount of 14,000*l.*, and that the same, at the time of the payment hereinafter mentioned, had not been, nor was, nor had been, or was any part thereof applied in the purchase of any real estate whatsoever; and that after the said 31st of August, 1815, to wit, on the said 26th of January, 1832, they the said Wm. Hancock and George Reade, having so taken upon themselves the burthen of such execution as

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aforesaid, paid and satisfied the said residue of the said personal estate of the said Samuel Malbon, so being of the value aforesaid, to one John Malbon, the said John Malbon then and there being entitled under and by virtue of the said will of the said Samuel Malbon to the said residue, without having received or deducted the duty chargeable upon the said residue; and that the said John Malbon then and there was a descendant of a brother of the father of the said testator, Samuel Malbon, and that the duty which, according to the statute in that behalf made and provided, then and there was chargeable, and should and ought to have been paid, for and in respect of the said residue so being of the amount aforesaid, then and there amounted to a large sum of money, to wit, the sum of 560*l.*, which said duty is still wholly due and unpaid to his said Majesty, whereby, &c.

Plea.—That the said Samuel Malbon, by his said will by him made and executed as in the said information mentioned, gave and devised all his estates in Cheshire and Staffordshire, and all other his real estate except mortgages in fee, unto the said Dr. William Vivian and one James Morrell, their heirs and assigns, to and upon the several uses and trusts, and for the intents and purposes therein-after mentioned, viz. to the use of Dr. William Gorst and his assigns for and during the term of his natural life, on condition that he should take and use the surname and arms of Malbon, and from and after the determination of that estate, then to the use of the said William Vivian and James Morrell and their heirs during the life of the said William Gorst, in trust to support contingent remainders, and from and after the decease of the said William Gorst, to the use of the first and every other the son and sons of the body of the said William Gorst lawfully begotten or to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and

respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; and for default of such issue, to the use of Ralph Malbon for life, with remainder to his issue in tail; and for default of such issue, to the use of Samuel Malbon for life, with remainder to his issue in tail; and in default of such issue, with the ultimate remainder to the use of his own right heirs. The plea then set forth a proviso that if the said W. Gorst or his issue should refuse or neglect to take and use the name and arms of Malbon, the uses and estates devised to them should go over to the persons in remainder. It then stated that the said Samuel Malbon in and by his said will, after thereby giving and bequeathing divers pecuniary legacies and annuities therein mentioned, gave, devised, and bequeathed all the rest and residue of his said goods, chattels, and personal estate (from and after payment of his just debts, funeral and testamentary expenses, and the said legacies and annuities), as also such real estates as he the said Samuel Malbon was seised of as a mortgagee in fee, unto the said Dr. William Vivian and Dr. William Gorst, their heirs, executors, administrators, and assigns, upon trust to convert the whole of the said residue of his personal estate into money, and to lay out and invest the same as soon as conveniently might be in one or more purchase or purchases of freehold lands, tenements, or hereditaments in Cheshire or Staffordshire, as near as they could to Congleton, to be conveyed to the said William Vivian and James Morrell, their heirs and assigns, to, for, and upon the same uses and trusts, and subject to the same provisoes and powers as were thereinbefore mentioned and declared of and concerning the said estates thereinbefore devised to them, or as near thereto as might be, and the deaths of persons and other contingencies would admit at the time when such purchases should be made; and it was declared that it was his the said Samuel Malbon's will and desire that his said executors should and might

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in the meantime, and until such purchase or purchases could be made, put and place or continue all and every part of his said personal estate out at interest in their names on mortgage or mortgages of real estates, or, if the same should not offer, in the public funds, with power from time to time to call in and receive the monies so put or placed out, or to sell and dispose of the monies in the funds, or any part thereof, and again to put out, place, or invest the same monies or any part thereof, in the manner aforesaid, as often as there should be occasion and they should think fit, subject to the trusts aforesaid; and the said Samuel Malbon, by his said will, directed that in the mean time, and until the residue of his personal estate should be laid out in such purchase or purchases, the clear yearly interest or produce that should be made thereof should from time to time be paid to and received by such person and persons, and for such uses and purposes as and to whom the rents and profits of the estate and estates therewith to be purchased as aforesaid, if purchased, would for the time being belong by virtue of that his will; and the said Samuel Malbon, the said testator, by his said will, nominated and appointed the said Drs. William Vivian and William Gorst executors of his said will as aforesaid. And the said William Hancock and George Reade further say, that afterwards, and before the making and passing of a certain statute made and passed in the 36th year of the reign of our late Sovereign Lord King George the Third, intituled "An act for regulating certain duties on legacies and shares of personal estates, and for granting other duties thereon in certain cases," to wit, on the 3rd day of April, in the year of our Lord 1791, the said Samuel Malbon, the said testator, died, as in the said information mentioned, without revoking or altering his said will as to the devises and bequests in this plea stated and set forth, or as to any of them, or as to the said appointment of executors; and the said W. Vivian and W.

Malbon, the said W. Malbon being one and the same person as the said William Gorst mentioned in the last-mentioned will, afterwards, and after the death of the said Samuel Malbon, to wit, on the 6th day of May, 1791, took upon themselves the burthen of the execution of the said will; and the said William Hancock and George Reade further say, that the said William Malbon, being interested under and by virtue of the said will of the said Samuel Malbon as aforesaid in the said residue of the personal estate of the said Samuel Malbon for his the said William Malbon's own use and benefit, and on his account, and the said William Vivian at the request and for the use and benefit, and on the account of the said William Malbon, afterwards and before the 31st of August, 1815, to wit, on the 11th of August, 1792, according to the last-mentioned will in that behalf, put and placed out at interest in their names on mortgage of real estate a large sum of money, to wit, the sum of 7000*l.*, parcel of such residue as last aforesaid, by then lending and advancing the same to one T. L. B., to wit, on mortgage of certain lands, tenements, real estates and premises with the appurtenances, situate and being in the county of Chester, which were heretofore, and before the said 31st of August, 1815, bargained, sold, released, conveyed, and mortgaged to the said William Malbon and William Vivian and their heirs, as thereafter mentioned.

The plea then set forth a mortgage in fee by lease and release by T. L. B., whereby he conveyed certain real estates to Vivian and Malbon in fee, with a proviso for reconveyance on payment of 7000*l.* and interest. And the plea also stated a subsequent deed, dated March 12, 1793, whereby the said T. L. B. made a further charge on his same estate of the further sum of 7000*l.* And it averred that the said two sums together amounted to 14,000*l.*, and were the said residue in the said first count of the information mentioned of the personal estate therein men-

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tioned. And the said W. Hancock and G. Reade further say, that after lending and advancing the said sums of money as aforesaid, to wit, on the 1st of January, 1797, the said W. Vivian died, leaving the said W. Malbon then surviving; and that, as well before as after the death of the said W. Vivian and before the said 31st of August, 1815, the said W. Malbon being by virtue of the said will in that behalf entitled thereto for his own sole and individual use and benefit, to wit, on the 12th of August, 1793, and on divers other days and times between that day and the time of his death, received from the said T. L. B. divers large sums of money, amounting to a large sum of money, to wit, 9,200*l.*, as and for, and which were interest, and were paid to him by the said T. L. B., as and for interest on the said several sums of 7000*l.* each so lent as aforesaid : and that afterwards, and after the death of the said W. Vivian, to wit, on the day in the first count mentioned, the said W. Malbon made his last will and testament in writing, and thereby appointed the defendants executors thereof; and that the said W. M. afterwards, to wit, on the 11th of December, 1826, died, without revoking his will as to the said appointment of executors; and that afterwards, and after the death of the said W. M., to wit, on &c., the defendants took upon themselves the execution of the said wills of the said Samuel Malbon and W. Malbon respectively, as in the first count mentioned. And the said W. Hancock and G. Reade further say, that by the said putting and placing of the said sums of 7000*l.* out at interest as aforesaid, and lending and advancing the same respectively as aforesaid, and the receipt and payment as aforesaid of such interest as aforesaid, according to the will of the said S. Malbon in that behalf, the said sums of 7000*l.* became and were appropriated, satisfied, and discharged before the 31st of August, 1815. And the said defendants further say, that for the use and benefit, and at the request and on the account of the said John Mal-

bon, they received the said sums of money which were so lent and advanced upon mortgage as aforesaid, being the said residue in the said first count mentioned of the said personal estate of the said Samuel Malbon, and paid and satisfied the same to the said John Malbon, being entitled as in the said first count mentioned, and being also such descendant as therein mentioned. Verification.

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Demurrer, and joinder in demurrer.

The following were the points marked for argument on the part of the Crown.—The *Attorney-General* claims the payment of duty under the 55 Geo. 3, c. 184, schedule part 3, title “Legacy;” 44 Geo. 3, c. 98, s. 12; 36 Geo. 3, c. 52, s. 19; and intends to argue that the facts disclosed in the defendant’s plea do not shew that the residue of the personal estate of Samuel Malbon, the testator, was paid, delivered, retained, satisfied, or discharged before the 31st of August, 1815; because, first, the said residue remained under the control of the executors, and they were responsible in respect of the same until after the last-mentioned day: secondly, it remained a matter of uncertainty, until after the death of William Malbon, who would be entitled to the benefit of the bequest of the residue. Thirdly, it is admitted by the plea that the defendants took upon themselves the burthen of the execution of the will of Samuel Malbon, which they could not have done if all his assets had been previously administered.

The defendant’s points were, that personal estate directed to be laid out in the purchase of land was in no manner subject to payment of legacy duty until the passing of the act of 36 Geo. 3, c. 52; and therefore, the testator having died five years before the passing of that act, that the legacy duty imposed by that statute did not at his death attach on his personal estate, nor can acts subsequently passed alter the then existing law, such acts being acts imposing penalties, and therefore not to be construed retrospectively. Also, that the testator’s estate having

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been laid out on mortgage, pursuant to the trusts of the testator's will, and the amount got in and ascertained, and invested on mortgage, under the powers of the will, in 1795, the personal estate was appropriated before the 31st of August, 1815, and consequently the duty imposed by 55 Geo. 3, c. 184, does not attach.

The Solicitor-General for the Crown.—The question is, whether, upon the construction of the acts of Parliament, this was a legacy paid, satisfied, appropriated, and discharged previously to the 31st of August, 1815. The act of 55 Geo. 3, c. 184, after repealing all prior duties, imposes the duties mentioned in the schedule in the following terms :—" Legacies and successions to personal estate upon intestacy." This duty is imposed " when the testator or intestate died before or upon the 5th April, 1805. For every legacy, specific or pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by any will, &c., of any person who died before or upon the 5th April, 1805, out of his or her personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st August, 1815; also for the clear residue (when devolving to one person), and for every share of the clear residue (when devolving to two or more) of the personal estate of any person who died before or on the 5th April, 1805," " whether the title to such residue, or any share thereof, shall accrue by virtue of any temporary disposition, or upon a partial or total intestacy, where such residue, &c. shall be of the value of 20*l.* or upwards, when the same shall be paid, delivered, retained, satisfied, or discharged after the 31st of August, 1815," a duty of so much per cent., according to the degree of relationship. It is clear that the testator died before the 5th of April, 1805; and the question is, whether this is a clear residue devolving to a person by virtue of a testamentary disposition " paid,

delivered, retained, satisfied, or discharged after the 31st of August, 1815." It will be necessary, in order to make this matter clear, to call attention to the different acts of Parliament imposing legacy duties. The first act was the 20 Geo. 3, c. 28, which imposed on every piece of paper or parchment on which any receipt for any legacy should be given, a duty of 2s. 6d. The next statute was the 23 Geo. 3, c. 58, which enacted that, from and after the 1st of August, 1783, there should be levied, collected, and paid the several stamp duties following; viz.—For every skin of parchment, or sheet or piece of paper, upon which shall be engrossed, written, or printed any receipt, &c. for any legacy left by any will, &c., or for any share of personal estate divided by force of the statute of distributions, &c., the amount whereof shall not exceed the value of 20*l.*, an additional stamp of 5s.; and where the amount shall be of the value of 100*l.*, an additional stamp duty of 20s., and a like additional stamp duty upon every further sum of 100*l.*" Then came the 29 Geo. 3, c. 51, which imposed an additional stamp duty in the same way, upon the receipt. But it was found that parties evaded any payment of legacy duty at all, by not taking receipts; and it was thought that the only way to prevent this would be, to have the duty imposed, not on the receipt, but on the legacy itself. With that object the 36 Geo. 3, c. 52, was passed; which, for many purposes, is still the statute regulating the payment of legacy duty. That statute enacts, in the first clause, that the several duties by the said several acts imposed on receipts for legacies, and for shares of residue upon which any duty should be imposed by that act, should cease and be no longer paid, and so much of those acts as related to such duties so repealed should be repealed. It did not enact that all the former duties should cease as to all legacies, but only as to such as could not be rendered liable to the payment of duty by that act. The 2nd section enacts, "That upon every

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legacy specific or pecuniary, or of any other description, of the amount or value of 20% or more, given by any will or testamentary instrument of any person who shall die after the passing of this act, out of the personal estate of the person so dying; and also upon the clear residue of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear yearly value of 100% or upwards, which shall remain after deducting debts, funeral expences, and other charges, and specific and pecuniary legacies (if any), whether the title to such residue or any part thereof shall accrue upon any testamentary disposition, or upon intestacy, there shall be raised, levied, collected, and paid unto and for the use of his Majesty, his heirs and successors," certain duties therein mentioned. The effect of that clause was, to impose a duty upon the legacy in case of parties so dying after that act, and to modify the amount of duty. Then the 19th section of that act is important. It enacts, "That any sum of money or personal estate directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate, unless the same shall be so given as to be enjoyed by different persons in succession; and then each person entitled thereto in succession shall pay duty for the same, in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually employed in the purchase of real estate before such duty accrued; but no duty shall accrue in respect thereof after the same shall have been actually employed in the purchase of real estate, for so much thereof as shall be so applied: Provided nevertheless, that in case before the same or some part thereof shall be actually so applied, any person or persons shall have become entitled to an estate of inheritance in possession in the real estate to be purchased therewith, or so much thereof as shall not have been employed in the purchase thereof, the same duty

shall be paid which ought to be paid by such person or persons, and raised and paid out of the fund remaining, to be applied in such purchase." The meaning of that clause, it is conceived, was only to exonerate from the payment of duty a legacy to be invested in the purchase of an estate to be enjoyed by parties in succession, provided it was invested before the duty accrued, not to give an exemption which was not given before that clause. In this act there are contained Government tables as to the value of lives. That was done to bring the bequest of an annuity within the duty. The act then provides the mode in which the value of the annuity is to be calculated, and the mode in which the duty is to be assessed on the annuity, which is this:—The legacy being converted into an annuity, the duty is paid in four different yearly instalments, to be deducted out of each of the four first payments which the annuitant is to receive. The act afterwards provides for the manner in which the duty is to be paid on property to be taken in succession. If the legatees are all persons in the same degree of relationship, and who, therefore, are all to pay the same rate of duty, the statute requires that there shall be at once charged the whole duty, charging it as a gross legacy; but if the duty to be paid by the persons enjoying in succession is different the act provides that each party taking in succession is to be treated as an annuitant for the amount he receives, and he is to pay according to his estate. Now, suppose this clause to have been omitted, and suppose the case of a legacy of a sum of money to be invested in real estate, to be enjoyed by the wife for life, and after her death by a stranger in blood; the wife, paying no duty, would have a right to say the whole legacy should be laid out in the purchase of real estate, and the stranger in blood would pay no duty, if it had not been for this clause, which the legislature introduced, not intending that, the whole being laid out in real estate, the stranger in blood should be relieved from

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paying the duty when it came to him. While he was to receive it in the shape of dividends or funds, he would, of course, pay duty on the amount. The converting it into land appeared to the legislature to open a door to fraud, if it should become necessary to inquire, as each person came in succession into the estate, what the rents and profits of that estate were. They therefore said, that where there is a direction that a sum of money shall be laid out in land, until the sum is laid out, the parties entitled to it in succession shall pay as annuitants for the amount they are to receive; but when it is actually laid out, the liability to duty shall cease. Until the money is laid out it is to be deemed as an annuity, and the party is to be charged with duty accordingly; with this exception, that if it is not laid out until it comes to the person entitled to an absolute estate of inheritance, the surplus shall be liable to the duty. It has been thought necessary to call the attention of the Court to that clause, because it is intended to be urged on the other side, that inasmuch as this was money which previous to the 36th Geo. 3, had not been subject to duty, being directed to be laid out in land, the liability to duty does not attach on money given by a testator who died in 1791. The state of the law continued the same from the passing of the last mentioned act in 1796 till 1804, when, by the 44th Geo. 3, c. 98, all the existing stamp duties were repealed, and in lieu of them other stamp duties were imposed, but merely increasing the amount, and not in other respects altering the state of the law. But there was a material clause introduced into that act which is important to the question in this case, as to whether the legislature intended a retrospective effect in the act of 1796. It is necessary to remark, that after the 36 Geo. 3, c. 52, there were two distinct duties payable; the duties under the old acts in cases where the testator had died previously to the passing of that act, and the duty on legacies in respect of

parties who had died afterwards. That was found to be very inconvenient, and to lead to many frauds, and by the 12th section of the 44 Geo. 3, (which recited the first three acts imposing a duty on receipts for legacies), it was enacted, "that the said duties on legacies given or bequeathed by or derived from persons who died previous to the 27th of April, 1796, shall be and remain payable and shall be paid to and for the use of his Majesty, &c., for and during the term of two years from and after the 10th day of October, 1804, and that from and after the expiration of two years from and after the 10th day of October, 1804, every such receipt or other discharge for or in respect of any legacy given or bequeathed by or derived from any person whatever, whether such persons shall have died previous to or since the 27th day of April, 1796, shall be and the same is hereby made liable to the respective duties on receipts or other discharges for legacies mentioned and set forth in the schedule marked A. hereunto annexed." That is material with reference to what the legislature thought right upon that subject, namely, that from the passing of that act certain persons should be liable to a smaller duty if the duties were paid in a given time, but that upon a testator's dying at a subsequent period, the legatees under his will should be liable to a larger duty. The next act was the 45 Geo. 3, c. 38, which was the first that imposed the same duties on legacies charged upon real estate which had been previously imposed on personal estate; and was also the first act which imposed a duty on legacies given to the children of a testator. That act had no retrospective operation, and applied only to legacies given by persons dying after its passing. The next act, 48 Geo. 3, c. 109, only raised the duties on legacies to strangers. Then came the act now in force, the 55 Geo. 3, c. 184; which enacted, that the existing stamp duties should cease, and that there should be payable the duties set forth in the schedules.

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It provides for the payment of legacy duties mentioned in the schedule thereto annexed; and the schedule states, "Where the testator, testatrix, or intestate died before or upon the 5th April, 1805, for every legacy," &c., "where every such legacy shall be paid, delivered, retained, satisfied, or discharged after the 31st of August, 1815,"—shall be paid certain duties according to the degree of relationship: in the case now before the Court it would be a duty of 4 per cent. on the amount of the legacy. But in the case of a party who dies *upon or after* the 5th of April, 1805, there is, in respect of a person in the same degree of relationship as in the present case, a duty of 5 per cent. payable. That is most material to be observed, because there is here an *express* retrospective enactment. It is not applied to parties dying after that act, but after the 5th of April, 1805. If the party had died on the 6th April, 1805, the legacy duty payable by a person in the situation of the descendant of a father's brother, was, but for this enactment, only 4 per cent.; but this clause says, that if the legacy shall be satisfied after the passing of this act of 55 Geo. 3, he shall pay, not four per cent., but five. This act came into operation on the 31st of August, 1815, and then the higher duty was imposed, not on the legacies of persons dying after that time, but on legacies given for ten years previously, provided they were not paid until after that day. But it will be said that the legislature could not have meant to impose a duty which would not have been payable if the duty had been paid in 1791:—it is a sufficient answer to say that that is what the legislature have uniformly done throughout these acts. Then the question is whether, under the circumstances disclosed in this plea, it being clear that this was a legacy or share of residue given by the will of a person who died before the 5th of April, 1805, it is one, according to the words of the 55 Geo. 3, "paid, delivered, retained, satisfied, or discharged" after the 31st of

August, 1815; and it is submitted it clearly is, and that the crown is entitled to judgment on this demurrer.

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[The argument then turned on the question as to what amounted to an appropriation or payment of a legacy, or satisfaction of the residue; but as the Court did not deem it necessary to give any opinion on this point, it is not thought proper to detail the argument. The following cases were cited: *Attorney-General v. Lady Louisa Manners* (a), *Hill v. Atkinson* (b), *Attorney-General v. Wood* (c), and *Attorney General v. Hope* (d).]

Kelly, contra.—The duties claimed in this case are not payable by law, under the circumstances which appear on this record. The question whether there has been an appropriation within the meaning of the late statutes is only a secondary and subordinate question. The principal question is, whether, under any of the statutes which have been passed since the 36 Geo. 3, any post facto operation has been given to that act which it clearly did not bear at the time it was passed. The defendants contend that the duties claimed by this information were for the first time made payable by the 36 Geo. 3, and that they were not, under that statute, payable retrospectively—namely, upon legacies given by the wills of persons who had died before the passing of that act; and that no retrospective operation has been given to it, either by the 44th, the 45th, or the 55th Geo. 3, the only three subsequent statutes that have reference to it. There is no doubt that every one of these acts which have been passed since the 36 Geo. 3, has *some* retrospective effect; but that is only with respect to the *amount* of the duties imposed, and none of them has any retrospective operation as to the *subject* of any duty which is for the first time made payable by the 36 Geo. 3. Although

(a) 1 Price, 411.

(b) 2 Merivale, 45.

(c) 2 Y. & J. 290.

(d) 1 Mylne & Craig, 69.

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from time to time higher duties are made payable—and even retrospectively—by acts passed since 1796, yet no duties are imposed by any of those acts upon legacies which were not liable to duty at all before the act of 1796. Before that date there were three statutes only under which any legacy duties were payable; and by those statutes the duties were imposed upon *receipts* for legacies only, and there was no direct duty imposed upon any legacy *eo nomine*. And thus the law continued to 1796, when the 36 Geo. 3 was passed, which made various essential alterations. The first alteration was that made by the first and second sections; the duties created by the former acts were to cease, and other and higher duties were substituted for them. Those larger duties applied only to legacies given by the wills of persons dying after the passing of that act. It is admitted that the act was not retrospective with regard to the increased duties. So that from the passing of the 36 Geo. 3, down to the passing of the 44 Geo. 3, there were two separate classes of duties in existence—the one, the class of duties of minor amount, which applied to persons who died before the act of 1796, and the other, the class of duties of the larger amount, created by the 36 Geo. 3, and payable only by persons deriving legacies under the wills of persons who died subsequently to the passing of that act. Thus the law continued down to 1804, when the 44 Geo. 3, c. 98, was passed. But there were several other distinct alterations of the law provided for by the 36 Geo. 3. There was not only the increase of duties, but the duties which had been payable only on receipts for legacies, or rather higher duties, were made payable on legacies *eo nomine*. [Lord Abinger, C.B.—That was only upon legacies subsequent]. Yes, and it will be found that in no respect was the act 36 Geo. 3, retrospective. Then the third alteration is important. Before the 36 Geo. 3, c. 52, s. 19, money directed to be laid out in land was not liable to any duty. It was not so

because no receipt was given, for then it would have been liable indirectly, but money directed by a will to be laid out in land was neither directly nor indirectly liable to any duty. There was a further alteration; that whereas executors who were themselves legatees, viz. to whom the residue was bequeathed, were not before liable to pay any legacy duty, but by the 6th section they were made liable like other persons. [Lord Abinger, C. B.—They were not before liable, because they gave no receipts]. Then a fifth alteration was created by the 25th section, by which money paid into the Court of Chancery on a bill filed for the administration of a testator's effects is made liable to legacy duty just as if the money had been paid, without any suit, by the executor to the legatee. These several alterations were made by the act 36 Geo. 3, but that act, it is submitted, had no retrospective operation. Then the 44 Geo. 3, c. 98, was passed, and the first question for the Court to determine will be, whether by that statute a retrospective operation was for the first time given to the 36 Geo. 3, throughout the whole of its provisions, or whether any greater effect is to be given to the 44 Geo. 3, than that, whereas from the passing of the act 36 Geo. 3, the minor duties had been payable only under wills of persons dying *before* 1796, and the larger duties payable by those claiming under wills of persons who died *after* 1796, the same scale of duties was to continue for two years; that is, that parties claiming under the wills of persons dying previous to 1796, were to pay only the smaller duties for two years, but afterwards both classes were to pay the same amount of duties. That was the only effect of that statute as to any retrospective operation. There is nothing to be found in it which imposes any duty at all upon any subject matter not liable to duty before 1796. [Lord Abinger, C. B.—You mean, nothing to affect legacies of money to be laid out in land]. Certainly, as money directed by wills to be laid out in land was never

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before liable to any duty at all. The 44 Geo. 3 did not impose a duty upon any matter which was not previously liable to a duty, neither did it give a retrospective operation to the 36 Geo. 3, in cases in which that statute for the first time imposed a duty. It is admitted on the other side that the 45 Geo. 3, c. 38, has no retrospective effect. Then comes the 55 Geo. 3, on the words of which so much reliance is placed, and which, it is contended, has no limitation or qualification of its terms, which apply in their fullest extent, making but one distinction, viz. between persons dying before and persons dying after 1805, and that upon all legacies this is the only distinction, provided the money is not paid till after the passing of the act. Now, it is submitted that the effect of that act was only to increase the duties already payable, making a distinction with regard to the duties between persons dying before 1805 and after 1805, but not imposing any duty at all upon that which had paid *no duty* before. If the extensive construction contended for on the other side is to prevail, it would apply as well to the case of children deriving money under the wills of their parents, where the parent died before the 45 Geo. 3, as to a duty for the first time imposed upon a distinct class of persons by the act of 36 Geo. 3. It is true that some of the statutes have a retrospective operation under certain circumstances with regard to the amount of duties payable; but the Court will not strain the construction of any act of Parliament in order to give it the effect of an *ex post facto* law, especially where it relates to the imposition of a tax. All statutes which impose taxes are to be construed strictly. [*Parke, B.*—No tax is to be imposed except by clear words; that is the modern doctrine.] If it be possible within the reasonable limits of legal construction to give a meaning to an act which will not give it an *ex post facto* operation, the Court will lean to that construction, rather than give it an operation which may lead to great injustice. To shew

that this may be so in numerous cases, it is only necessary to suppose that between the year 1791 and 1796, when for the first time the duty was imposed upon money directed to be laid out in land, some ultimate remainder-man having a vested interest had actually sold or charged the property to its full value; the effect of this *ex post facto* law would be to impose upon that purchaser actually a confiscation of money out of his own pocket, he having purchased in full faith of the existing law as it stood. It is said that by the 36 Geo. 3, no change in the law took place except to remedy the evil that had existed, of duties having been imposed upon receipts instead of upon the legacies themselves. It is submitted that it was upon totally different principles from the mere practical effect of requiring a receipt that money directed to be laid out in land was not, until it was expressly made so by the 36 Geo. 3, liable to any duty at all. In the *Attorney General v. Holford* (a), which was a case that arose in the year 1815, it was held that "a bequest of real property to trustees to be sold, and the profits to be deemed part of the residue of the testator's estate, or go in aid, if necessary, of the rest of his property in discharge of his pecuniary legacies, given either by his will or any codicil thereto, is liable to the legacy duty imposed by the 48 Geo. 3, c. 149, although the residuary legatee took the property *in statu quo*, and the trustees did not convert it into money by sale, according to the directions of the will, there being no claim to render such sale necessary. The subject of such a bequest would be considered in equity as personal property, and would go, in case of the legatee's death, to personal representatives." Now that is the converse of what the present case would have been before the act of 1796. The question there was, whether, under the 44 Geo. 3, the land was liable to the payment of legacy duty. It was held that it was; and

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(a) 1 Price, 426.

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upon this ground,—upon the very principle which, before the 36 Geo. 3, would have exempted money directed to be laid out in land from any duty at all,—namely, that, in the construction of that act, the equitable nature of the bequest is considered, and not what may happen, at any particular moment of time, to be its real and legal nature. This is a devise of money to be laid out in land, which a court of equity would treat as land. In *Attorney-General v. Holford*, it was a devise of land, but it was to be applied like personalty. [*Parke, B.*—Is it not provided by the 55 Geo. 3, that that shall be treated as a legacy?] Probably it is. The words are: “For the clear residue, &c. of the monies to arise from the sale, mortgage, or other disposition of any real or heritable estate directed to be sold, mortgaged, or otherwise disposed of by any will or testamentary instrument of any person who shall have died after the 5th day of April, 1805, where such residue or share of residue shall amount to 20*l*,” so much. In his judgment on that occasion, Chief Baron Thompson put this very case:—“Suppose a sum of money were bequeathed to be laid out in land, is such a legacy provided for by the act? That would certainly be deemed, in equity, land, and not money; and if you go on equitable construction, you must admit that also to prevail.” Before the 36 Geo. 3, money directed to be laid out in land would, in any case arising upon the legacy duty, independently of any point about a receipt being given, be treated as land itself. Equity considers that as being done which it is the duty of the executor or trustee to do: consequently, equity would have considered that it had actually been laid out in land. But it is not necessary to refer to any authority; because, of what use is the clause itself, if the duty would be payable upon it as a legacy? It has been argued on the other side as if the 19th section went to exonerate from duty where it was before payable. [*Parke, B.*—Yes; as if duties on such legacies were payable before the 36 Geo. 3, and

there was a protection from legacy duty in the event of the money being actually laid out]. If that be so, it is framed in very extraordinary terms. The section enacts, "that any sum of money or personal estate directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate;" it then goes on—"unless the same be so given as to be enjoyed by different persons in succession; and then each person entitled thereto in succession shall pay duty for the same, in the same manner as if the same had not been directed to be applied in the purchase of real estate, unless the same shall have been actually employed in the purchase of real estate before such duty accrued; but no such duty shall accrue in respect thereof after the same shall have been actually applied in the purchase of real estate, for so much thereof as shall have been so employed." Now, upon what principle can it be said that, before this act, any duty at all was payable upon money directed to be laid out in land? The former acts cannot be carried further than their terms will warrant, and none of them allude expressly to money laid out in land: they merely impose a duty on receipts. Then, if, down to the 36 Geo. 3, money to be laid out in land was liable to no duty, how can it be said that this clause, which for the first time imposes a duty in that respect, is a clause exonerating parties from some duty to which they were previously liable? [*Parke, B.*—Supposing the executor, after that act, had laid out the money in land, and had asked for a receipt from the legatee under the old act, the question is, whether it must have been stamped with the duty required by this act? The argument of the Solicitor-General is, that it would be so: it still would be a *legacy* within the meaning of the former act. If a party chooses to take a receipt upon paper for the money which ought to be laid out in land, the question is, whether that discharge would not require a legacy stamp]. That must depend upon what was in the

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contemplation of the legislature at the time of passing those three acts. [*Alderson, B.*—You must also take into consideration the form of the release; because if the release was upon the payment of money, it would be a receipt: but, suppose the receipt was simply a release from the obligation of laying it out in land, and nothing more?] The legislature did not contemplate these complicated transactions, but they contemplated this:—It was the practice under those three former acts, and is still the practice, for the executor, before he pays a sum of money, to take a receipt; and therefore they took it for granted that the executor would not pay a pecuniary legacy without taking a receipt, and thought it sufficient to impose a tax, not on the legacy, but on the instrument which would be taken when it was paid. But, bearing in mind that they had never before said that any duty was to be imposed on money to be laid out in land, are we to suppose that they were not only thinking of money payable in the usual course, but were also looking at the contingent possibility that money directed to be laid out in land, instead of being laid out according to the provisions of the will, should be paid in money by the executor to the legatee? It is apprehended that that would be giving a meaning to the legislature which they never entertained, and that for the purpose of imposing a tax, which ought never to be done except by express terms. It is submitted, therefore, that there is no ground for saying that any tax of this kind was ever imposed till the statute in question; and that this question is now to be considered as if it had arisen before the passing of the 36 Geo. 3. This being the only statute applying to the case, and the 19th section not being *expressly* retrospective in its operation, it is to be deemed prospective only.

Then, to come to the 44th Geo. 3. There were at that time three classes of cases: the first, in which duties had been imposed by the first three acts of Parliament antecedent to

the 36 Geo. 3, imposing duties on receipts; then by the 36 Geo. 3 the duties on receipts were repealed, and the duties imposed upon the legacies themselves; but that was in the case of persons dying after 1796; and there was also a higher scale of duties in the case of persons dying after that date. Then there was a third case, which it is submitted is not touched by the act of 1804. That was the case of money directed to be laid out in land, and upon which, for the first time, a duty had been imposed by the act of 1796. After various other provisions in the 44 Geo. 3, the 12th section, reciting the 20 Geo. 3, for granting several additional duties on advertisements, and certain duties on receipts for legacies, or for any share of a personal estate divided according to the Statute of Distribution, or the custom of any province or place; and also reciting the 23 Geo. 3 and 29 Geo. 3, (the three acts which were still in force with reference to the minor duties,) proceeds to state, that "whereas certain duties are charged upon receipts or other discharges for and in respect of legacies given or bequeathed by or derived from persons who died previous to the 27th day of April, 1796, for and during the term of two years from the 10th day of October, 1804; be it therefore enacted, that the said duties on legacies (that is, duties imposed by those three acts,) given or bequeathed by or derived from persons who died previous to the 27th day of April, 1796, shall be and remain payable, and shall be paid to and for the use of his Majesty, his heirs and successors, for and during the same term of two years from and after the said 10th day of October, 1804, anything in this act, or any other act or acts of Parliament, contained to the contrary in anywise notwithstanding; and that from and after the expiration of two years from the 10th day of October, 1804, every such receipt or other discharge for or in respect of any legacy given or bequeathed by or derived from any person whatever, whether such person shall

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have died previous to or since the 27th day of April, 1796, shall be, and the same is hereby made subject and liable to the respective duties on receipts or other discharges for legacies mentioned, inserted, and set forth in the schedule marked A. hereunto annexed." Now, the only acts which had been then before referred to, were the three first acts imposing the minor duties; and the question is, whether that is not a provision affecting only the amount of the duties which had been imposed by the former acts, or whether it was meant to impose those additional duties, and also to comprise certain classes of cases where no duty had been previously payable at all. There is nothing in the language of the section to point to such a construction as the latter. There is no recital of those numerous clauses of the 36 Geo. 3, by which duties were imposed for the first time under particular circumstances: there is no reference to the 19th section, imposing duties on money to be laid out in land. Now, let us suppose that the act which passed in 1805, imposing a duty upon legacies given by parents to children, had passed in the year 1800,—that is, after 1796, and before this provision; and that a duty of a certain amount had been thereby imposed upon legacies from parents to children; would this provision have made those children liable to the payment of legacy duty in the event of their legacies not being paid within the period of two years specified in this section? Because, if it would not, and if no duties were payable upon money to be laid out in land till 1796, neither would this statute impose any duties upon any legacies in that predicament. The terms of the act would apply to one case as well as the other. It is submitted, therefore, that the 12th section of the 44 Geo. 3, when it imposes the additional duties, refers only to those cases in which some duties were payable before, and not to those cases in which for the first time duties were imposed by the act of 1796. [*Alderson, B.*—The case of a child is

expressly provided against, because the duty is confined to the case of a legacy given to a brother, a sister, a father, or a mother; that is in the 44 Geo. 3. *Parke, B.*—And your argument is upon the supposition of a legacy to children]. The act is just as silent upon money laid out in land, which is made the subject of a distinct provision in the act of 1796, as it is upon money payable to children. [*Parke, B.*—It is silent expressly; but there is a clause which incorporates all the clauses of the 36 Geo. 3, by relation.] No doubt, with reference to all provisions necessary to carry the act into effect; but it is submitted as a principle of law that those general words of an act of Parliament which apply *prima facie* to the amount of legacies, cannot be held to impose a tax upon some distinct subject upon which no tax was imposed before. *Hill v. Atkinson (a)* is in point. The act of 1815 need not be particularly adverted to, because that merely raises a similar distinction between persons dying before and after 1805, that the act of 1804 raises with respect to persons dying before and after 1796. It is submitted, first, that these being statutes imposing a tax, and which, if construed as contended for on the part of the Crown, would have an *ex post facto* effect, they are to be construed strictly as against the Crown, and liberally in favour of the subject, and that they cannot, without being strained beyond their natural construction, be brought to mean any thing more than that these increased duties are to be payable where the minor duties were payable before, and are not to have the effect of creating duties which were not payable before at all. [He also argued on the question of appropriation.]

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The Solicitor-General, in reply.—It has been argued that it would be an unjust construction of the act of Parliament to give a retrospective effect to it by subjecting something

(a) 2 Merivale, 45.

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to duty which was not liable to it at the time the act passed. It is admitted, however, that the act did subject legacies to higher duties than they were liable to at the time the act passed, provided they had not been paid at the time of its passing. Now it would be equally unjust in the one case as in the other. [Lord *Abinger*, C. B.—I understood Mr. *Kelly* to say, that if the words are clear, *cadit quæstio*; but that if there are words enough to satisfy the object of the act without, it is not to be pushed beyond that by construction. *Alderson*, B.—The truth is, all the legacy acts were retrospective from the beginning, because the duties were originally imposed upon receipts, and those receipts were given for legacies under wills made before the act of Parliament]. Just so. The case of *Hill v. Atkinson* was a case where, if the legacy had been paid immediately after the testator's death, there would have been no duty at all. Nothing has been stated in the argument to shew that this retrospective operation was not to be applied to money to be laid out in land as much as to any other provision in the act. There is room for very strong doubt whether the duty upon money given to be laid out in land was not a duty just as much attachable under the former acts as under the act of 1796—for that which rendered any duty at all payable under the former acts was the receipt. Perhaps there were numerous instances in which no duty was in fact paid in cases of that kind, because the money was in fact invested in the purchase of land without any receipt being required from any one. Suppose a party, where money is directed to be laid out in land, is entitled to an estate of inheritance, he has a right to say to the executor, "Hand me over the money instead." Could a receipt for that money, given to the executor, be given in evidence unless it had not a legacy stamp upon it? Certainly not. A sum of money given to be laid out in land is a legacy to all intents and purposes. It does not cease to be a legacy because a particular appropriation of it is directed. The

only argument against that construction would be supposing the enactment of the 36 Geo. 3 was unintelligible ; but it is not, according to the construction assigned to it on the part of the Crown. It was necessary to give directions, as there were payments to be made by parties according to their rights of taking in succession, what was to be done with regard to money to be laid out in land so to be settled. And the act begins by saying, " That any sum of money or personal estate directed to be applied in the purchase of real estate, shall be charged with and pay duty as personal estate." Then immediately follows, " unless the same shall be so given as to be enjoyed by different persons in succession," and then it directs what is to be done. [*Alderson*, B.—Then it is to be paid as annuities]. Yes ; but it particularly enacts that at that moment of time in the succession when the investment has actually taken place, the liability to further duty shall cease, for an obvious reason. [*Lord Abinger*, C. B.—If the duty had passed upon land, it would have introduced inextricable confusion]. The liability to pay duty upon a legacy in respect of money directed to be laid out in the purchase of land, was nothing new in the act of 1796, except so far as it might happen that there might be no receipt given for the money. If so, the act was not retrospective, and there is an end of the argument. But suppose it were otherwise, and that the Court should be of opinion that, as no receipt in the nature of things could be given for it, the first three acts did not apply ; it will still appear that it was intended after the act of 1796 that it should be liable to duty. Suppose, before 1796, a testator had given 10,000*l.* to A. B. and C. D. nominatim, as individuals, not as executors, upon trust that they should lay it out in the purchase of land, to be settled in a particular manner. It could hardly be argued that upon payment of the money by the executors to A. B. and C. D., they were not to give a receipt. But suppose a legacy to be

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given in that mode before 1796—the act of 1796 passes—the act of 1804 passes, which says that from the 10th of October, 1806, all the duties in the first three acts shall absolutely cease and determine. Now, suppose the legacy is not paid for some reason till after 1806, what duty is to be payable then? It cannot surely be argued that it was the intention of the act of 1796 to exempt from duty something that was liable under the former acts. That would be an absurdity which it seems impossible to impute to the legislature. [*Parke, B.*—*Mr. Kelly* would admit, if there was a legacy receipt required by the 22 Geo. 3, then, after the year 1806, such a legacy receipt must be given stamped with the larger duty; but he says that if no legacy receipt was required at all before 1796, none would be required after 1806]. In the case before put, of the money having been paid before 1796, and a receipt given by the trustees to the executors, can it be disputed that that receipt must be stamped with the legacy stamp then in force? [*Lord Abinger, C. B.*—It could not be given in evidence without]. Then suppose the money is not paid till after 1806: is there any duty payable? Certainly not, unless the retrospective clause, as it is called, is to come into operation, because all the duties under the old acts are repealed. [*Alderson, B.*—There is another mode of looking at the 19th section, whether it is or is not in truth a qualifying clause, providing for the payment of the duty the moment it became vested in any person having an estate of inheritance before it is laid out in land. *Parke, B.*—Your argument was that it was liable before, and that it was exempted from duty the moment it was laid out in land. The meaning of the act was to make the duty payable upon the money so to be laid out in the purchase of land, in all cases where it can be got at. It can be got at in all cases while it remains in money—it can be got at in all cases where the corpus

is to be applied in favour of some person who is actually entitled to the corpus itself when it has been laid out; but the legislature saw that there were intermediate cases where the interests of parties in succession would arise, and where there would be a difficulty in saying what was to be paid, and therefore they cut the knot in such cases, and exempted it from liability altogether. If somebody is entitled in fee before it gets into the shape of land, then the entire duty is paid upon it; but if it is invested in land, and the day after somebody is entitled to it in fee, then it is exempt.] That is the view insisted upon by the Crown: but if that is not so, there cannot be any great difficulty in giving the same (so called) retrospective operation to that clause any more than to any other clause of the act, when it is clear that such was the intention of the legislature.

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Cur. adv. vult.

The judgment of the Court was afterwards delivered by

Lord ABINGER, C. B.—This was an information to recover the duties upon a certain legacy of the residue of the personal estate of Samuel Malbon, which was alleged by the information to be paid and satisfied to John Malbon in the year 1832. There is a plea by the defendants setting forth the facts, and to this plea there is a demurrer.

The testator died in 1791. The residue of the estate, by the will of the testator, was to be invested in land, to be settled to the same uses as the real estate before devised; that is to say, to the use of Wm. Gorst for his life, with remainder in tail to his issue, and for default of issue, with remainder to the use of Samuel Malbon for his life, with remainder in tail to his issue in strict settlement; remainder to Ralph Malbon for his life, with remainder in tail to his issue. The residue was to be in the hands of his executors

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until invested, and the interest and dividends, until laid out in land, were directed to be applied to the same uses as the land.

The residue was ascertained to be 14,000*l.*, and was invested in mortgage in the names of the executors William Gorst and William Vivian before the year 1796, and before the act of 36 Geo. 3, c. 52. After which William Vivian died, and William Gorst, who enjoyed the interest during his life, became the surviving executor. He died without issue in 1825, and appointed the defendants his executors. The money has remained as originally invested on mortgage, and has now become the property of John Malbon, as one of the persons in remainder under the will. And it is charged in the first count of the information, and admitted in the plea, that the defendants, as executors of the original testator, having taken upon themselves the execution of this will, have, in the year 1832, paid and satisfied the residue aforesaid to the said John Malbon, as the person so entitled under this will. The question arises upon the application to these facts of the 65 Geo. 3, c. 184. The material words to be found in the third part of the schedule to that act relating to legacies and successions to personal estate are these: "Where the testator or intestate died before or upon the 5th of April, 1805, for every legacy, specific, pecuniary, or of any other description, of the amount or value of 20*l.* or upwards, given by the will of any person who died on or before the 5th day of April, 1805, out of his personal or moveable estate, and which shall be paid, delivered, retained, satisfied, or discharged after the 31st day of August, 1815, and for the clear residue when devolving on one person, and for every share of the clear residue when devolving on two or more persons of the personal estate of any person who died before the 5th day of April, 1805, when the same shall be paid, delivered, retained, satisfied, and discharged, after

the 31st day of August, 1815," certain rates of duty are to be paid, not material to be stated. *Exch. of Pleas, 1837.*

Now it is clear in this case that the testator died before the 5th day of April, 1805; and it is admitted by the pleadings that the clear residue of his personal estate, not being laid out in land, was paid and satisfied by the defendants to John Malbon, the person now entitled to it under the will, after the 31st day of August, 1815. Therefore the case falls precisely within the words of the schedule, and must be governed by them, unless it can be gathered by some necessary inference arising from the several acts in *pari materiâ*, taken altogether, that it is an excepted case.

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Accordingly it has been contended, that it appears by the pleadings that the clear residue was appropriated and paid to the first person entitled to it under the will, in the year 1793, before any of the acts existed which could have relation to this will. And if the only person entitled to this residue had been William Gorst, the first taker, there might have been great force in that argument; the legacy might have been considered as paid and satisfied to him, by the final application of its ascertained amount to his use before any of the statutes could reach it. But upon looking at the will, it appears that by the course of events the same residue might devolve upon a succession of persons before it was laid out in land, and that the executors are expressly charged to keep it in their controul until laid out in land; and it appears by the pleadings that events have happened by which the residue, still being personal estate, has devolved upon John Malbon under the provisions of the will, and that it was paid and satisfied to him in the year 1832 by the defendants in the execution of the will. It was therefore in the state and form to which the act of 55 Geo. 3, c. 184, applies, and it was paid within the time which that act embraces.

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No question can arise upon any former appropriation or supposed payment of it: as it is clear that if a legacy passing to several persons in succession, according to the directions of a will, can be properly said to be paid and satisfied to each of them in turn, the words of the schedule, and of the statute 36 Geo. 3, c. 52, which provides for such cases, may apply to the last of these payments, if made after the 31st day of August, 1815, although one or more of the first payments may have taken place before that date. It is not necessary, therefore, to refer to the cases which have been cited at the bar to ascertain what shall be deemed a payment and satisfaction of a residue, and at what time it shall be deemed to have taken place, when, by the admitted facts which appear upon the pleadings, the payment and discharge in question did not take place until the year 1832.

The main ground on which the defendant's counsel relied was, that the act 55 Geo. 3, c. 184, although retrospective as to the rate of duties which were payable under the former existing acts upon legacies left by persons dying before the 5th day of April, 1805, was not retrospective of those wills, upon the legacies under which no duty was payable. In other words, that the act was intended to raise the duty where a duty was before payable, but not to impose a duty upon any legacy which was before subject to none. As the equity of the duty on legacies and successions to personal estate was supposed to consist in this, that though a direct tax upon capital, it affected no existing interest, and as all direct taxes upon capital must be unjust if they are partial, the Court not only lent a willing ear to this argument, but would gladly have discovered any legal ground for excluding by construction any imposition of the tax, even by way of increase, upon interests not in hope, expectancy, or speculation, but actually existing and forming part of the calculated and lawful resources of individuals.

But, upon a careful examination of the statutes, no such distinction can be found. It is remarkable that the act which first imposed a duty upon legacies themselves as contradistinguished from the duty upon the mere receipts, namely, the 36 Geo. 3, c. 52, is an act confined to that subject, and with a title importing the subject of it; and that the act which first charged duties upon legacies payable out of land, namely, the 45 Geo. 3, c. 28, in like manner is confined to the subject, and has a title to attract attention to it; in both of which acts there are express clauses to confine their operation to wills subsequently made, whereas the retrospective enactments are to be found only in the schedules to general stamp acts.

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It appears, then, that by the 44 Geo. 3, c. 98, s. 12, the duties on receipts for legacies which were imposed by the acts previous to the 36 Geo. 3, were continued for two years only; and that by the schedule to the same act the new duties upon legacies were imposed after the expiration of these two years, and by retrospect upon legacies under wills of persons who had died at any period antecedent to the 27th of April, 1796, when those legacies should be paid after the expiration of those two years; and by the schedule to the last act of 55 Geo. 3, c. 184, before referred to, the duties which existed at the time of passing that act are charged by retrospect upon all legacies left by persons dying before the 5th day of April, 1805, and which should be paid after the 31st day of August, 1815. There is no exception, therefore, to be found in favour of any actual interest, for whatever length of time it might have been vested, provided it was not actually reduced into possession, and the executor fully exonerated, before the last-mentioned period.

An attempt was made in the argument to distinguish from others the cases of legacies left to be laid out in land, as if these were in the nature of devises of land; and it

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was said that the act of 36 Geo. 3, c. 52, was the act which first charged this sort of legacy with a duty, confining it to the cases of persons dying after the passing of the act, as if that act had merely increased the rate of duty upon other legacies, but imposed for the first time a duty upon the legacies to be laid out in land. If there were any ground for this distinction, the consequence would not follow that legacies of this kind should be exempted from the retrospective clauses in the subsequent acts. But in truth the distinction does not exist. There is no reason for supposing that legacies to be laid out in land were not within the scope of the former acts imposing a stamp duty upon receipts, whenever a receipt for such a legacy might be given. Nor does the act of 36 Geo. 3, c. 52, impose a duty upon the legacy itself in these cases, any more than it does upon legacies of mere personal estate. Both classes are for the first time made subject to duties, independently of the stamp duties upon the receipts; and receipts are for the first time made imperative for both under a penalty, and the executor as well as the legatee are made for the first time accountable parties for both. There is no more reason, therefore, for excepting this class of legacies, to be laid out in land, than there is for excepting all others, from the operation of the retrospective schedules. Upon these grounds we are of opinion that judgment upon this demurrer ought to be entered for the Crown.

Judgment for the Crown.

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TEAGUE v. MORSE.

THE declaration stated that the defendant, on the 12th of March, 1836, made his promissory note in writing, and thereby promised to pay the plaintiff 30*l.* 13*s.* 6*d.* as follows; namely, 2*l.* on the 12th day of April then next, the further sum of 2*l.* on the 12th day of May then next, and the like further sum of 2*l.* on the 12th day of each and every succeeding month afterwards, until the whole of the said sum of 30*l.* 13*s.* 6*d.* should have been fully paid and satisfied; and that in case of default in payment of any one of the said instalments, then and in such case the defendant promised to pay to the plaintiff, or order, on demand, the said sum of 30*l.* 13*s.* 6*d.*, or so much thereof as should be and remain unpaid at the time of such default. And the defendant, on the day and year first aforesaid, delivered the said note to the plaintiff, and promised the plaintiff to pay the same according to the tenor and effect thereof; and the plaintiff avers that afterwards, to wit, on the 15th day of May, in the year of our Lord 1836, default was made by the defendant in payment of divers, to wit, two of the said instalments of 2*l.* each by the said note so payable as aforesaid, being the first two instalments thereby made payable; whereby, and according to the tenor and effect of the said note, the defendant became liable to pay to the said plaintiff the said sum of 30*l.* 13*s.* 6*d.*; yet the defendant hath disregarded his promise, and hath not paid the said sum of 30*l.* 13*s.* 6*d.*, or any part thereof.

General demurrer, and joinder in demurrer.

The point stated for argument on the part of the defendant was, that by default in payment of the instalments, or any of them, the note mentioned in the declaration did not become payable without a demand of the

Declaration on a promissory note, dated 12th March, 1836, whereby the defendant promised to pay the plaintiff 30*l.* 13*s.* 6*d.*, as follows; viz. 2*l.* on the 12th April then next, the further sum of 2*l.* on the 12th May then next, and the like sum of 2*l.* on the 12th day of each and every succeeding month afterwards until the whole should be paid; and that, in case of default in payment of any one of the instalments, then the defendant promised to pay to the plaintiff, or order on demand, the sum of 30*l.* 13*s.* 6*d.*, or so much thereof as should remain unpaid. The plaintiff averred that default was made in payment of the first two instalments, whereby, according to the tenor and effect of the note, the defendant became liable to pay to the plaintiff the said sum of 30*l.* 13*s.* 6*d.* General demurrer, on the ground that, by default in payment of the instalments, the note did not become payable without a demand of the amount of it:—*Held*, that the demurrer was too large.

murrer, on the ground that, by default in payment of the instalments, the note payable without a demand of the amount of it:—*Held*, that the demurrer was too large.

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amount of it; and that the declaration was bad, for not averring a demand of payment of so much of the note as was unpaid at the time of the default.

R. V. Richards, in support of the demurrer.—The declaration is bad. It does not contain any averment of a demand; and although it is settled that, upon a bill payable on demand, the bringing of the action is a sufficient demand, that rule does not apply to the present case. It was the duty of the defendant to pay 2*l.* per month; and in case of default in payment of any one of the instalments, the whole sum is payable on demand. But the defendant cannot know, unless a demand is made, whether the plaintiff means to insist on payment of the whole amount or not. He may bring his action either for the whole amount of the note, or for an instalment. If he chooses to demand the whole, he may do so; but until he insists upon that by a demand of it, it does not become payable. In *Birks v. Trippett* (a), it was held that, in assumpsit on a promise to pay a collateral sum on request, an actual request is necessary before an action can be brought, and the declaration must aver a request. Here the contract to pay the whole sum is in the nature of a penalty; so in *Birks v. Trippett*, the contract was to perform the award, and, if not, to pay 40*l.* on request: and the Court held an actual request necessary.

PARKE, B.—What do you say to the two instalments being due? The demurrer is too large: there is clearly a debt as to those two instalments.

Judgment for the plaintiff.

(a) 1 Saund. 32.

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JONES v. TURNBULL.

PLATT having, on the part of the defendant, obtained an interpleader rule, calling upon the assignees of the plaintiff to support their claim to the money for which the action was brought, it now appeared from the affidavits that the plaintiff, who was still an uncertificated bankrupt, had after his bankruptcy done considerable repairs to a house of the defendant on his own account, and in that work had employed several workmen; that the plaintiff had afterwards brought an action against the defendant for the price of the repairs, but in consequence of the credit on which they were done not having expired, he was nonsuited. It was, however, at the trial, referred to a barrister to ascertain what was due to the plaintiff in respect of the repairs, and an award having been made, finding that there was a sum of 124*l.* due to him, his assignees gave notice to the defendant that they claimed the amount as part of the plaintiff's estate. The defendant having, in consequence of that notice, refused to pay the plaintiff, the present action was brought. The attorneys who had been employed by the plaintiff in the former action, as well as on the reference, claimed a lien as against the assignees for the amount of their bill.

Where an uncertificated bankrupt brought an action for work done by him, and on a reference a certain sum was found to be due to him, which his assignees thereupon claimed from the defendant: —*Held*, that, on a fresh action being brought by the bankrupt for the amount, the defendant might call upon the assignees, by an interpleader rule, to support their claim, and that upon such rule the lien of the bankrupt's attorney for their costs in the former action and the reference ought to be satisfied out of the amount claimed.

Chandless, for the assignees.—This demand was clearly part of the estate of the plaintiff, to which the assignees were entitled: *Poole v. Crofton* (a). Before the Interpleader Act, if an action had been brought against the defendant by the assignees, it would have been no answer as to any part of the demand, that the attorneys, under the circumstances, were entitled to a lien for their costs in the former action and reference; and the introduction of the Interpleader Act could not affect the legal rights of

(a) 1 B. & Adol. 568.

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the parties, according to which alone a court of law must decide. It could not rest in the option of the holder of the money, for whose benefit the act was passed, and who might or might not avail himself of it, to determine by his conduct whether or no the other party should be entitled to the amount.

Kelly, contrà, submitted that, the case coming before the Court on an interpleader rule, the equitable as well the legal rights of the parties ought to be adjusted.

PER CURIAM.—It is clear that the assignees ought not to receive this money without satisfying the lien of the attorneys; it is an equitable right as against them, who have the benefit of the claim, which has been rendered productive by the services of the bankrupt.

Rule accordingly.

LAIDLER v. BURLINSON.

Trover for one-fourth of a ship. In the year 1833, and until his bankruptcy, one J. L. carried

TROVER for one-fourth part of a ship. The defendant pleaded, first, not guilty; secondly, that the plaintiff was not possessed as of his own property of the said one-

on business as a ship builder; and on the 10th June, 1833, the following agreement was entered into:—"Particulars and description of a new ship now about one-third built in the yard of J. L.;" then there followed a description of the length, breadth, and depth of the ship, the number of tons she was to carry, and the timbers, and particulars of every thing that she was to be built of and supplied with, "for the sum of 1750*l.*, and payment as follows, opposite to each respective name." This agreement was signed by J. L.; and after his signature followed these words:—"We, the undersigned, hereby engage to take shares in the before mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by several persons for different shares and at different times, and, amongst the rest, by the plaintiff for one fourth, in October 1833. Below these signatures was written the following:—"14th July, 1833—I hereby agree to accept the above price and mode of payment—J. L." The plaintiff proved payment for his share by bills before the bankruptcy of J. L. The T. C. Company signed the agreement for one-fourth, of which company one H. was a member, and used to go to look at the vessel when building, and occasionally found fault with the work, which was improved in consequence, and J. L. told his foreman to act under H.'s direction. At the time of the bankruptcy, the frame of the vessel was on the stocks in J. L.'s building-yard in an unfinished state, and, after the bankruptcy, some of the men continued to work upon her, and receive their money from H.:—*Held*, that, under these circumstances, the property in one-fourth of the vessel did not pass to T. L., the plaintiff.

fourth part of the ship; and thirdly, that before the supposed conversion, one James Laing became a bankrupt, and the defendant was appointed his assignee, and that at the time of the bankruptcy the ship was in the possession, order, and disposition of him the said James Laing, as reputed owner, by consent of the true owner. Upon the two first pleas the plaintiff took issue, and to the last plea he replied, that the said ship was not by the consent and permission of the plaintiff, as true owner thereof, in the possession, order, or disposition of the said James Laing as reputed owner; and upon this also issue was joined. At the trial, at the Spring Assizes for Northumberland, 1836, before Lord *Denman*, C. J., a verdict was found for the plaintiff for 200*l.*, subject to the opinion of this Court upon the following case.

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In the year 1833, and until the time of his bankruptcy, James Laing carried on business as a ship-builder, at Middlesborough, in the county of York. An agreement, signed by James Laing and the plaintiff, and the other parties whose names purport to be thereunto signed, was produced in evidence at the trial, which was as follows:—

“ Middlesborough, 10th June, 1833.

“ Particulars of build and description of a new ship now about one-third built, in the yard of James Laing. Length of keel aground 75 ft. 6 in.; rake forward, 7 ft.; rake of post, 1 ft. 6 in.; extreme breadth, 24 ft. 4 in.; depth of hold, 13 ft. 4 in.: and will admeasure 200 tons register, and carry 14 keels of coals at 12 ft. 9 in. water. Keelfinners, Eng. elm forward, and aft, Am.; in-midships frame all Eng.; also stern, sternpost, and hooks; floors, 10½ to 11 inches, sided and moulded first futtocks, 8½ by 9; second ditto, 7½ by 8; top timbers, 7 by 6 at the wales, and 4 inches top height; keelsons Am. oak; outside plank below the light marks, Am. elm, birch, or Engl. beech, 2½ inches in the flat; three strakes of 4-inch in each bilge, and two strakes of

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3-inch and 2 and a half upwards; from thence 3-inch oak to the wales; the wales three strakes of 4 inch, two black strakes 3-inch and $2\frac{3}{4}$, top-sides $2\frac{1}{2}$ -inch; paint strake and covering boards 3-inch; water ways 4-inch; all oak decks; 3-inch red pine ceiling; one strake of 3-inch next the keelson; part of floor $2\frac{1}{2}$ -inch; three strakes of $3\frac{1}{2}$ -inch in the bilge, from thence $2\frac{1}{2}$ -inch in the midships, and 2-inch the ends; two strakes of 3-inch beam clamps, 4-inch stringer above the HB. and ceiling, between decks 2-inch, and one strake of 3-inch deck beam clamp. To have 11 HBeams and 15 deck beams, fastened with wood or iron lodging knees; to have five hooks forward, and have sufficient coaming, windlass, bits, catheads, rudder, capstern, boats, checkers, hatches, bulkheads, and the hull to be completed in every respect with carpentry, joiner, blacksmith, turner, painter and plumber work, long-boat and skiff, and to be fitted out with all spars, masts, cordage, chains, anchors, copper stores and every other stores sufficient and as usual in the coal trade, and ready to take in a cargo of coals without any extra whatever, and to be launched in the early part of September next. Two chain cables 85 fathoms each, one chain hawser 60 fathoms, hempen tow-line and two warps, a spare topsail, foresail, and fore-topmast staysail; the paint-strakes to be English oak; for the sum of 1750*l.*, and payment as follows opposite to each respective name." This agreement was signed by James Laing, and after his signature followed these words:—"We the undersigned hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment:

Tees Coal Company pay-	}	6 mo. 29, Bill, £200	0	0
ment for one-fourth,		7 mo. 12, Cash,	233	2

James Laing.

John Atkinson, one eighth; payment in rope and canvas.

Thomas Laidler, one-fourth.

William B. Earle, one-eighth.

William Fairbridge one sixteenth, Cash, 55*l.* July 25, 1833.

Philip and Joseph Heselton, one-eighth.

Anthony Harris, for one sixteenth, Cash }
and goods, 103*l.* 15*s.* 9*d.*—12 mo. 5, 1833. } Jas. Laing.

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"Middleborough, 14th July, 1833. I hereby agree to accept the above price and mode of payment.

James Laing."

In the month of October, 1833, the plaintiff entered into and signed the above agreement. Wm. B. Earle, Fairbridge, and P. and J. Heselton afterwards, and before the act of bankruptcy, at separate times entered into and signed the agreement. Anthony Harris, whose name appears last as a party subscribing it, on the 18th of January, 1834, (and not before, although it purports to bear date in December), the day after James Laing committed the act of bankruptcy on which the fiat hereinafter mentioned was founded, entered into and signed the agreement in question. It is to be taken for the purpose of this case, that whatever might be the effect of the agreement as to passing the property in the respective shares to the several parties, at all events one-sixteenth, which A. Harris agreed to buy, did not pass to him, but became vested in the defendant, as assignee of James Laing under his bankruptcy. In order to prove payment by the plaintiff to Laing for his proportion of the ship, he gave in evidence the following facts, viz.: that in the month of June, 1833, he had accepted a bill for 30*l.*, drawn by Laing upon him, and which was paid by him when due; also that another bill, dated 29th October, 1833, was drawn by Laing upon and accepted by the plaintiff for 293*l.* 6*s.* 8*d.*; and he then proved that on the 5th of December, 1833, timber to the amount in value of 129*l.* 12*s.* 9½*d.* was supplied by him to Laing, which

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was expressly agreed at the time of the supply to be taken in part payment for the said vessel.

In the month of June, 1833, the said James Laing had the ship, in respect of which this action is brought, about one-third built, and in his ship-yard, and he had at that time no other ship upon the stocks; and from that time until the time of the bankruptcy of James Laing he proceeded with the building of this ship, and after the signature of the plaintiff to this agreement, expended large sums of money in and about building it. The Tees Coal Company whose signature appears to the agreement, consisted at that time of two persons named Taylor and Harris. Harris used to go and look at the vessel when building, and occasionally found fault with the work, which was improved in consequence, and the bankrupt had told his foreman to act under Harris's direction. On the 17th of January, 1834, Laing committed an act of bankruptcy, and on the 25th of the same month a fiat issued thereon against him, under which he was adjudged a bankrupt; and the defendant was duly appointed assignee of his estate and effects. At the time of the bankruptcy the frame of the said vessel was on the stocks in Laing's building-yard, in an unfinished state, and after the bankruptcy some men continued to work and receive their money from Harris.

The messenger under the fiat seized and took possession of the ship in the building-yard of James Laing.

The vessel was ultimately completed.

To prove a conversion by the defendant of the ship in question, the plaintiff's attorney proved that on the 24th of January, 1835, he, on the part of the plaintiff, made a demand of the vessel on the defendant, who answered that he had sold it for 970*l.* or 980*l.* to a person named Metcalfe, who, at the time of the demand, and at the time of the commencement of this action, had possession of it. The vessel, at the time of the bankruptcy, was not in the possession, order, or disposition of the bankrupt, as reputed owner thereof.

The first question for the opinion of the Court is, whether or not the property in one-fourth of the vessel passed to the plaintiff under the above circumstances; if not, a verdict to be entered for the defendant. If the Court shall be of opinion that the property passed, but that the defendant had not been guilty of a conversion, then a nonsuit to be entered; but if the property passed, and the defendant had been guilty of a conversion, then a verdict for the plaintiff for 200*l*. It is to be taken as a fact, that if the property in one-fourth passed to the plaintiff, the defendant was tenant in common of the vessel with the plaintiff.

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S. Temple, for the plaintiff.—The first question is, whether, by this agreement, the property in the ship passed from the bankrupt to the purchasers. The distinction is this:—where an artisan, directed to make an article not in being, prepares to make it, and goes on executing the order, but has power within the terms of the contract to deliver that article or a similar one, no property passes until the article is actually delivered; but where the article is in being at the time, the property vests at once in the purchaser, and the artisan is bound to deliver that specific article. In *Mucklow v. Mangles* (a), it was held that if a person contracts with another for a chattel which is not in existence at the time of the contract, though the purchaser pays the whole value in advance, and the seller proceeds to execute the order, the former acquires no property in the chattel until it is finished and delivered to him. *Heath, J.*, there says:—"If the thing be in existence at the time of the order, the property of it passes by the contract, but not so where the subject is to be made." This decision was recognised in *Woods v. Russell* (b), which is more like the present case, and is an authority in point. [*Alderson, B.*—In *Woods*

(a) 1 Taunt. 318.

(b) 5 B. & Ald. 942.

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v. *Russell*, that was not the important point.] The observations of *Abbott*, C. J., in delivering the judgment of the Court, are strongly applicable. He says: "This ship is built upon a special contract, and it is part of the terms of the contract that given portions of the price shall be paid according to the progress of the work ; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that as between him and the builder he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." It is true that this conclusion is somewhat qualified in *Clarke v. Spence* (a), where *Williams*, J., in delivering the judgment of the Court, after reading the above passage, says, "If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition in so general a form may be doubtful." But the present case is much stronger in its circumstances than *Woods v. Russell*. There no ship was in existence at the time of the contract, and it was held to be an appropriation of the specific chattel only when the first instalment was paid ; but here there was an express contract for a specific chattel, one-third of which was in existence at the time. The agreement states it to be "one-third built." No instalments were to be paid from time to time, but the whole purchase money was to be paid, and was paid. The bankrupt could not have built for these parties another ship answering the description, but was bound to deliver that identical ship. In *Woods v. Russell*, it is true there was the usual certificate of the builder that the ship was registered, which, in *Clarke v. Spence*, was thought

(a) 4 Ad. & Ell. 467 ; 6 Nev. & Man. 399.

to have influenced the decision of the Court. But the judgment does not proceed merely on that ground, but also on the ground that the property vested by the payment of instalments, in respect of an existing chattel. *Abbott, C. J.* says: "But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because here Paton (the builder) signed the certificate to enable the defendant to have the ship registered in his, the defendant's, name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant." "In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner, and when Paton concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as that oath described it to be?" That fact is not used as evidencing an actual delivery of the ship, but as shewing an acknowledgment by the bankrupt that the property was gone from him, and his consent that it should vest in the purchaser. Here the agreement shews the same kind of acknowledgment—it is a testification of his consent that the property had passed out of him. In *Clarke v. Spence*, the only doubt that existed was, whether the general words of Lord *Tenterden* ought not to be qualified, and they were qualified accordingly; but the general decision in that case would still be in favour of the present plaintiff. [Lord *Abinger, C. B.*—In *Clarke v. Spence* it was part of the contract that the ship was to be built under the superintendence of an agent of the purchaser]. There was no stipulation to that effect here, but in fact it was superintended by Harris, the agent of the Tees Coal Company. The case is in this respect certainly not so strong as *Clarke v. Spence*, but stronger than *Woods v. Russell*. Harris must be considered as superintendent for the purchasers generally.—Secondly, it

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is said that this action will not lie, because it is an action by one tenant in common against another; but the defendant is not entitled to that defence upon this record, since he cannot shew, under the plea of not guilty, that he was justified, as tenant in common with the plaintiff, in committing the conversion in fact: *Stancliffe v. Hardwick* (a). It was there expressly held, that if the defendant has made a conversion in fact of the chattel (as by a sale), which he proposes to justify by his joint control over it, he must plead in confession and avoidance, inasmuch as the plea of not guilty puts in issue the fact of the conversion only, and not the tortious nature of it (b).

W. H. Watson, contra.—First, no property passed by this agreement. The contract is, in the first part, rather a sort of prospectus of the ship, and of the mode in which she is ultimately to be completed. It is headed “Particulars of build and description of a new ship now about one-third built.” It does not purport to be a sale of a third part, as the hull of a vessel. The instrument goes on to describe the timber, anchors, &c., to be used and applied in the building of it “for the sum of 1,750*l.*” As far as that goes, it is a mere offer to sell a complete ship for so much. [*Parke, B.*—It appears to be a sort of what the civilians called *obligatio certi corporis*, which you say does not pass the property. The builder might be guilty of a breach of contract if he did not finish that ship; but the question is, if he finished it, and sold it to another, would *trover* lie?] The terms of acceptance are these—“We, the undersigned, hereby agree to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment.” That is, not we agree then to buy, but to take shares in the vessel when complete. The parties sign at different periods.

(a) 2 C. M. & R. 1.

(b) See also *Vernon v. Shipton*, ante, 9.

It is not like the case of one single party agreeing that a vessel is to be built for him, and to be under his superintendence. And there was in fact no superintendence; Harris merely went there like a person going to a coachmaker to see how his carriage, which he has ordered, is going on building. Where the specific article is ready for delivery, and the price fixed, the property passes; but if it is incomplete, and incapable of delivery, the property does not pass until the article is completed, and there is an assent on the part of the purchaser that it is conformable to the contract. It is expressly so laid down in *Clarke v. Spence*. [Lord Abinger, C. B.—Is assent or dissent material? May not the purchaser renounce it if it is not according to the contract, though the property may have passed?] No; he would be bound to take to it if the property had passed, and must bring his action for the injury done him by the breach of the contract. If the property has passed, there is no power of rejection. [*Parke*, B.—If the parties only agreed to buy that particular ship when complete, the property would not pass, though the builder could not comply with the contract by delivering another ship]. In *Clarke v. Spence*, there was no power of rejection. The judges there begin by laying down certain known principles of law (a): “That, in general, under a contract for the building a vessel, or making any other thing not existing in specie at the time of the contract, no property vests in the party whom, for distinction, we will call the purchaser, during the progress of the work, nor until the vessel or thing is finished and delivered, or at least ready for delivery and approved by the purchaser; and that even when the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days.” [*Alderson*, B.—There the payments were according to the

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(a) 4 Ad. & Ell. 466.

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corresponding portions of the work done, and it was a sale of each specific portion as completed]. *Woods v. Russell* has no application to the present case; it was decided on the ground of there being a certificate of registry. In *Goode v. Langley (a)*, A. agreed with B. to make a gig for a given price. The body of the gig and wheels were selected by B., and A. promised to deliver it in a few days. The full price was paid. Before it was finished it was seized by the sheriff under a fi. fa. against A. The gig was afterwards finished and delivered to B., with the assent of the judgment creditor; the sheriff subsequently retook it to secure his poundage: it was held that he had no right to do so, and that B. might maintain trover for the gig: but there the Court proceeded merely on the ground that the sheriff had made a second seizure of the goods, and that he could not protect himself for seizing twice. It was there argued that the right to the price and the vesting of the property were correlative: and the Court might easily have disposed of the case by saying that the property had passed to B. by a selection of part of the chattel, if they had thought so. In *Atkinson v. Bell (b)*, A., having a patent for certain spinning machinery, received an order from B. to have some spinning frames made for him. A. employed C. to make the machines for B., and informed the latter of it. After the machines had been completed, A. ordered them to be altered. They were afterwards completed according to this new order, and packed up in boxes for B., and C. informed B. that they were ready, but he refused to accept them: and it was held that C. could not recover the price from B. in an action for goods bargained and sold, or for work, labour, and materials. The argument was there rested on the ground that specific articles were pointed

(a) 7 B. & Cr. 26.

(b) 8 B. & C. 277; 2 Moo. & R. 292, S. C.

out to the purchaser as those with which the machines were to be completed. But *Bayley, J.*, says :—" When goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gave the order until the thing ordered is complete. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are so delivered." So here, all that appears is an intention that the ship in question should be delivered when finished, which intention might have been altered. The property might have passed if the plaintiff had assented after the ship was finished, but there was no such assent. Supposing the builder had died whilst it was unfinished, and his executor had been without assets, and unable to complete the vessel, if the argument on the other side is good for any thing, the purchaser would be entitled to the hull without paying any part of the price. But there is a greater difficulty still. The contract is by five or six persons to take shares. Who is to say whether the ship is built according to the contract? The money is to be paid, by the terms of the contract, according to the shares set opposite their respective names. It is obvious that payment and delivery would be cotemporaneous. The entire contract is in the hands of the builder. The times and mode of payment will not alter it: whenever the money was to be paid, the contract only is to be looked to for the intention of the parties. [Lord *Abinger*, C. B.—It all turns on the contract].

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Temple, in reply.—It is said that this is not a contract for an immediate purchase of the ship in its then state, but when completed. The words are, " We hereby en-

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engage to take shares in the before-mentioned vessel;" it is said that that means "vessel when completed:" but suppose the words had been, "We hereby engage to buy shares;" that would certainly have shewn a present intention; and the words used are in substance the same. The contract does not say "when finished." If actual payment is important to shew a purchase at the time of a specific chattel, according to *Woods v. Russell* and *Clarke v. Spence*, here there has been an appropriation by payment. [*Parke, B.*—No; the agreement itself was evidence in those cases of the intention of the parties that the property should pass at the time. This case would have been like *Woods v. Russell*, if the agreement had been to pay so much down, and so much when finished]. The contract vests a property at the time of signing. It makes no difference that the purchasers sign at different times, as the vendor signs only once. [*Alderson, B.*—The contracts for shares were signed at different times: what specific portion of the congeries of planks does each buy?] It was the purchase of a ship which was described to be in a certain condition on the 10th of June, 1833; and it continues to exist six months afterwards, although more work was then done to it. The vendor signs only once, at that date: it is not a contract signed by him at different times for the sale of a different article. The signature of the bankrupt at the time is evidence of an intention to vest the property in the purchasers, and that it was to take effect when signed. If the purchasers had not been bound, they would not have paid the money afterwards. The payment shews that the contract was not to have effect afterwards, but in præsentia.

Lord ABINGER, C. B.—There is no occasion to qualify the doctrine laid down in *Woods v. Russell* or *Clarke v. Spence*. I consider the principle which those cases establish to be, that a man may purchase a ship as it is in progress of building; and by the terms employed there, the

contract was of that character: a superintendent was appointed, and money paid at particular stages. The Court held that that was evidence of an intention to become the purchaser of the particular ship, and that the payment of the first instalment vested the property in the purchasers. Suppose the builder had died after the first instalment was paid,—the ship in its then state would have become the property of the purchaser, and not of the executors. A party may agree to purchase a ship when finished, or as she then stands. Of which sort is this contract? Did it pass the property to the purchaser presently, or was it to pass when the ship was finished? I think it is of the latter description. There would have been a specific sum appropriated, if a sale in the present state had been intended. The contract is also for goods to be supplied, cables, &c., when she was finished. If the seller became bankrupt, or died, what sum could be recovered? No price is appropriated by the parties. It is not till she is finished and delivered that the sale takes effect.

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PARKE, B.—I concur in the view which has been taken by the Lord Chief Baron. The whole case resolves itself into a construction of the contract. Was it a present bargain and sale of the materials of the ship lying there? If a man bargain for a specific chattel, though it is not delivered, the property passes, and an action lies for the non-delivery, or of trover. *Langfort v. Tiler (a)*. But it is equally clear that a chattel which is to be delivered *in futuro* does not pass *by the contract*. Two questions arise:—First, is this an article which would correspond with the terms of the contract?—secondly, is it a contract for an article to be finished? In the latter case, the article must be finished before the property vests. In the first, an action would lie at once for the non-delivery. The contract describes all

(a) 1 Salkeld, 113; Sheppard's Touchstone, 224, 225.

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the several particulars to be supplied, and then it concludes, "We the undersigned agree to take shares in the before-mentioned vessel." The plaintiff is a purchaser of one-fourth. It is clear that he was not to pay for the materials as then existing; and also that many other parties, according to the stipulations, were to have an interest in the ship when finished. It is most like the case of *Mucklow v. Mangles* (a). There is no sum here which can be said to be the price of the chattel in its then state. In *Woods v. Russell* there were three ingredients, on which the judgment of the Court was founded. First, a sum was paid, which appropriated the work as then finished; secondly, a superintendent was employed; thirdly, there was the certificate of registry. In *Clarke v. Spence* two of these circumstances concurred. The payment by instalments was evidence of appropriation of the work, as the instalments were paid. But here there is no sum which can by any possibility be considered as the price of the materials then put together. It was an entire contract to purchase the ship when finished, and no property passed till then.

BOLLAND, B.—In *Woods v. Russell*, and *Clarke v. Spence*, the contract was made for a specific thing in existence: here it is treated throughout as executory.

ALDERSON, B.—To vest the property, the identical goods must be sold, and the price fixed. What were the specific goods here? If one-third of the ship was sold, it would vest; but if it was to be the ship when complete, that was not ascertained at the time, and did not pass. In *Woods v. Russell*, the contract was for the sale of specific parts of the ship, to be paid for successively at particular stages of it; and it was held, that it vested the property in the ship so in progress. That was the construction of the

(a) 1 Taunt. 318.

contract ; and on similar words, in *Clarke v. Spence*, the same construction was put by the Court. *Exch. of Pleas, 1837.*

Judgment for the defendant.

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AUGARDE and Others, Assignees of WILLIAM LAST,
a Bankrupt, v. THOMPSON.

DEBT for goods sold and delivered, and for money found to be due on an account stated with Last before his bankruptcy, and also on an account stated with the assignees since the bankruptcy. Pleas, *nunquam indebitatus*, and a set off. It appeared that on the 4th of November, 1836, the defendant became bankrupt ; on the 5th a notice was given by the plaintiffs' attorney that the plaintiffs had elected to go in and prove their debt under the fiat, in pursuance of the 6 Geo. 4, c. 16, s. 59, and that no further proceedings would be taken in the action. No proceeding was taken on the part of the plaintiffs until the 9th of November, when the defendant served the plaintiff's attorney with a rule to reply ; upon which he applied to the Court for a stay of proceedings on the terms of the 59th section of the Bankrupt Act, and on the 14th, obtained a rule for that purpose. On the 16th of November, the plaintiffs' attorney attended with the assignees before Mr. Commissioner Williams, for the purpose of proving the debt, when evidence was gone into ; but in consequence of the absence of Last, the further consideration of the proof was adjourned. On the 16th of December they again attended ; but Last not having appeared, no further proceeding was taken in reference to the proof. The plaintiffs' attorney having learnt that there was to be another meeting on the 4th of January, served Last with a summons to appear ; and in consequence Last sent his brother to the

A plaintiff, to bring himself within the 59th section of the 6 Geo. 4, c. 16, must either prove his debt, or have his claim entered on the proceedings under the commission.

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plaintiffs' attorney, to inform him that he (the bankrupt) was confined to his house, and unable to attend before the Commissioner. The plaintiffs' attorney requested to have a medical certificate to that effect, which the brother promised him in the course of the day; but the certificate not having been sent, the plaintiffs, believing that Last would not appear before the Commissioner, did not attend. The affidavit of the plaintiffs' attorney also stated, that, immediately on the defendant's name appearing in the Gazette, the plaintiffs determined to relinquish, and did relinquish, the suit, intending to prove the debt under the fiat. On the 13th of January, *Crowder* obtained a rule calling upon the plaintiffs to shew cause why the defendant should not be at liberty to sign judgment for want of a replication, and why the rule of the 14th of November should not be rescinded. The affidavit on which this rule was obtained stated, that the plaintiffs' attorney had taken out a summons to set aside the proceedings, on the ground that the action had abated by the bankruptcy of the defendant; which was attended before *Bolland*, B., on the 7th and 10th of November, when the learned Baron decided that the action did not abate: that, on the 9th of November, the defendant's attorney served the plaintiffs' attorney with a rule to reply; that he did not reply, but, on the 14th of November, obtained the before-mentioned rule to stay the proceedings: that on the 4th of January, Last, the bankrupt, attended before the Commissioner, when he and the defendant were examined; that Last stated that the defendant's account was correct, and that there was a balance due to the defendant; and that, in consequence, the Commissioner refused to allow the plaintiffs to prove any debt, as the plaintiffs were indebted to the defendant.—In Hilary Term last,

Platt and *Hughes* shewed cause.—The question is,

whether this is a case falling within the 59th section of the 6 Geo. 4, c. 16. That section enacts, "that no creditor who has brought any action or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed." [*Parke, B.*—Is not that clause a protection given to the defendant?] It is apprehended it is a mutual protection. It cannot be held that a judgment is to be entered against the plaintiff for want of a replication, when he had no power to go on; and the act of claiming to prove under the commission totally prevents him from doing so. In *Ex parte Woolley (a)*, where the petitioner's claim had been rejected by the commissioners, on the ground that, as he was proceeding in an action, he ought, antecedent to the admission of his proof, to have produced the rule of discontinuance in the action, the Lord Chancellor said:—"If the creditor discontinues, he does it under the uncertainty whether his claim will be admitted or not; while, on the other hand, by the act of Parliament (49 Geo. 3, c. 121, s. 24), the proof or claim in itself operates as a discontinuance. In *Kemp v. Potter (b)*, where the plaintiff in an action against a bankrupt made his election to proceed under the commission, it was held, that the defendant was entitled to have some entry or suggestion recording the election put upon the record. If the defendant here had been applied to have that done,

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(a) 1 Rose, B. C. 394.

(b) 6 Taunt. 549.

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the plaintiffs would have done it. Immediately after the claim was made, the defendant might have called upon the plaintiffs to enter a suggestion. After the notice of the 5th of November, and the rule to stay the proceedings on the 14th, the plaintiffs were clearly precluded from going on. The protection ought to be mutual.

Crowder, in support of the rule.—The clause was intended to prevent the creditor having two remedies at the same time. It restricts him from proving under the commission, unless he relinquishes the action. [Lord *Abinger*, C. B.—It goes on—“and the proving *or claiming* a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed.” *Parke*, B., to *Platt*.—You must shew that you have proved, or claimed to prove, under the commission. Have you shewn that? *Platt*.—Yes; the term *claim* does not mean that the plaintiff is to make out that a debt is due.] The claim must be something specific. It is not enough to say, I demand a debt due from the bankrupt. There should be some specific claim, so as to have some entry on the proceedings before the Commissioner. The words of the statute are positive, and are confined to the proving a debt, or having a claim entered on the proceedings. [*Parke*, B.—In *Ex parte Frith* (a), it was held, that a party tendering the proof or claim of a debt under a commission, is entitled to the judgment of the commissioners upon his right to prove or claim, before he discharges the bankrupt, or relinquishes his action. There could not be a claim entered until the commissioner had allowed it. You say that the plaintiffs have never been in a situation to raise the question as to their election to prove

(a) 1 Glyn & J. 165.

under the commission.] No ; not until a claim is admitted to be entered on the proceedings. It is a statutable discontinuance as soon as the claim is properly made ; but to come within the act, there must be a regular claim entered. Suppose a party were to bring a frivolous action, and the defendant became bankrupt, and the plaintiff were to go before the commissioners and make a claim, and they refused it, could it be said that he might come here and allege that he had made a claim, and so get rid of the costs of the action ?

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Cur. adv. vult.

In the present Term,

LORD ABINGER, C. B., said :—On the argument in this case, a doubt arose whether the plaintiffs had done sufficient to constitute the making of a claim to prove under a commission of bankrupt, within the meaning of the 59th section of the Bankrupt Act. We are of opinion that a party does not bring his case within the act, so as to amount to an election to prove under the commission, unless he has proved his debt, or had his claim entered on the proceedings under the commission. The words are—"that no bankrupt who has brought any action, &c., in respect of any demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or *have any claim entered on the proceedings under such commission*, without relinquishing such action or suit ; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission with respect to the debt so proved or claimed." In this case, there has neither been a debt proved nor any claim entered on the proceedings under the commission. We are of opinion that the plaintiffs could not have the privilege of discontinuing

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the action without payment of costs, until one or the other has been done. That part of the rule which prays that the defendant may be at liberty to sign judgment, must be discharged; but the order to stay the proceedings must be rescinded.

Rule accordingly.

END OF EASTER TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Exchequer,

AND

Exchequer Chamber.

TRINITY TERM, 7 WILL. IV.

JAMES and Others, Assignees of ARTHUR EMERSON, a Bankrupt, *v.* GRIFFIN and HILLHOUSE. *Exch. of Pleas, 1837.*

TROVER for lead. The pleadings are fully stated in the report of this case on the first motion for a new trial (a). The Court having granted a new trial, the case was again tried at the London Sittings after Hilary Term, 1836, when the following facts were proved in evidence:—

In November, 1834, Mr. Stagg, a wholesale lead mer-

diately; A., in consequence, sent B., his son, with directions to land them at a wharf where he was accustomed to have goods landed for him, and kept until he carted them away to his customers in his own carts; but A. (being then insolvent) at the same time told B. he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were, by B.'s direction, landed at the wharf, and there stopped in transitu by the vendor. In trover for the goods by the assignees in bankruptcy of A. against the wharfinger:—*Held*, that the declarations so made by A. to B. were admissible in evidence, although they were not communicated to the vendor or to the wharfinger; and that they shewed that A. had not taken possession of the goods *as owner*, and therefore that the transitus was not determined. [Lord Abinger, C. B., dissentiente.]

(a) 1 Meeson & W. 20.

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chant at Stockton, shipped on board of two vessels called the Fanny and the Cumberland, a quantity of sheet lead, consigned to Emerson, the bankrupt, who carried on business as a lead and tin merchant in Lawrence Pountney Lane, and had there a counting-house and warehouse. The lead was deliverable to Emerson at London, *in the river*. The vessels arrived in the port of London on the 7th of December; on the 8th the captains called at Emerson's counting-house, and there saw his son, who transacted business for his father, and were very urgent to get the lead discharged. The son communicated the captains' wish to his father, but he gave him no directions. They came again on the 9th and 10th, and on the latter day Emerson, the bankrupt, told his son to tell the captains to take the lead out and land it at Beal's wharf, which was a wharf belonging to the defendants, Messrs. Griffin & Hillhouse, and nearly opposite to which the vessels were lying. The son in consequence went to Beal's wharf, and saw Hillhouse, and told him that they (the wharfingers) were to land the lead, on which Hillhouse asked *if it was to be carted away*. The son said he did not know. Hillhouse then said *it had better be piled away*; to which the son answered "Yes." It had been agreed between the captain of the Fanny and the son that he was to pay the lighterage himself, and not to charge it to his father. The Fanny was accustomed to land her goods at Beal's wharf. The Cumberland was accustomed to trade to an adjacent wharf called Heyes's wharf. The son stated that lead had been landed before on Beal's wharf for his father: that he was accustomed to land his sheet lead there, *and to have it piled up and kept there till he carted it away to his customers in his own carts; and that he never brought sheet lead to his own premises*, but sold it from the wharf: he seldom kept it so long as a month there, and did not pay wharfage: that his father's lead did not usually go from the vessel to the customers, but that he usually landed it at the wharf. It was his father's

practice to send *written orders* for landing the lead at the wharf, and also written orders when it was to be carted away. He had bought goods of Stagg before, and owed him 300*l.* or 400*l.* independently of this contract, and continued to do so until his bankruptcy. The son proved also that at the time his father spoke to him about landing the lead on the 10th of December, he told him that under the circumstances he would not meddle with it, that he did not intend to take it, and that Mr. Stagg ought to have it; but that he, the son, did not communicate that to the wharfingers; that he knew his father was then in insolvent circumstances; that the directions his father gave him were to tell the captains to land it, and to tell the wharfingers to receive it, but not to give a written order. The wharfingers, however, did not ask for any written order, nor why he did not give them one. On the same day, the 10th of December, the lead was lightered from the two vessels into a barge of the defendants, landed at Beal's wearf, and piled up there. On the 18th of December the defendants received a letter from Stagg, desiring them, if possible, to stop the lead, Emerson having refused to accept a bill for the price. On the 22nd of December, a fiat in bankruptcy was issued against Emerson, under which the plaintiffs were duly appointed assignees. The freight and wharfage of the goods still remained unpaid.

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The LORD CHIEF BARON, in summing up, said that he had received the evidence of the intention of the bankrupt not to meddle with the goods, not communicated to the defendant, or to any agent who could act for Stagg, with considerable doubt; but that, as it was admitted, he would leave it to them (the jury) for their opinion whether it made any difference in the conclusion to be drawn from the other evidence: and desired them to say, if they thought themselves bound to find, upon the other facts of the case, that the transitus was at an end, and that the defendants

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held as agents of Emerson, whether they thought the declared intention to the son, not communicated to the defendants, made any difference in their conclusion. The jury found for the plaintiffs, and stated that the intention of the bankrupt, expressed only to the son, and not followed up by any act, did not, and in their opinion ought not, to influence their verdict. The learned Judge, however, gave the defendant leave to move to enter a nonsuit, if the Court should think the intention so declared was evidence, and if, as matter of law, it was of sufficient weight to entitle the defendant to a verdict. *Alexander* having, in Easter Term, 1836, obtained a rule accordingly,

F. Pollock, Kelly, and Hoggins shewed cause; and Sir *W. W. Follett* and *Martin* (and *Alexander* was with them) were heard in support of the rule; but as the arguments were in substance the same as those urged on the former rule, it is deemed unnecessary to re-state them.

The Court took time to consider; and now, there being a difference of opinion amongst the Judges, they delivered their judgments seriatim.

ALDERSON, B.—In this case, which has stood over for some time, in the expectation that the parties would have come to some agreement between themselves, it is now become necessary that the Court should deliver their opinion; and as we are not agreed in that opinion, it falls to me to begin.

This was an action of trover by the assignees of a bankrupt, for some lead which had been shipped by a person of the name of Stagg, from Stockton in Yorkshire, and consigned to Emerson, the bankrupt. The defendants were wharfingers in London; and the only question for the Court is, whether Stagg's right to stop the goods in transitu was at an end or not. The facts in evidence were these:—The lead in question was shipped on board

two vessels, the Fanny and the Cumberland; and these ships arrived in the river on or before the 8th of December, 1834. On the 8th, 9th, and 10th of that month, the captains called at the warehouse of the bankrupt for orders, being urgent to get rid of the lead, in order to avoid demurrage. They could, however, obtain no directions from him; and threatened to land the lead unless he gave some directions about it.

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On the 10th of December, the bankrupt, who was then in insolvent circumstances, and indebted to Stagg to a large amount, told his son, who usually transacted business for him, to tell the captains to take the lead out of their vessels, and to land it at Beal's (the defendants') wharf, where his lead had been before deposited on various occasions. But the bankrupt told his son at the same time, that, under the circumstances in which he was, he would not meddle with it; that he did not intend to take the lead; that Stagg ought to have it. He was also forbidden by the bankrupt to give any written order for the landing of the lead to the captains, as had been the usual custom of the bankrupt before.

With these instructions, the son proceeded to act, and verbally directed the goods to be landed; and when they were landed, he saw Hillhouse, one of the defendants, and told him that they were to land the lead; and on his asking whether it was to be carted away, replied he did not know; that Hillhouse then said it had better be piled away. The son replied, Yes; and it was accordingly done. No communication of what had passed between the bankrupt and his son, as to the bankrupt's intention not to meddle with the lead, was made to the defendants.

These being the facts proved, and there being no doubt as to them, the Lord Chief Baron reserved the question, whether, under the circumstances, the transitus was at an end, for the Court, giving leave to the defendants to enter a nonsuit if the Court thought it was not at an end.

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And, after considering the case, I think a nonsuit ought to be entered. I cannot see why this case is not to be governed by the decision of the Court on the former occasion. In that case I conceived that the Court were unanimous in thinking that the question for the jury was, whether the acts done amounted to a taking possession of the lead by the bankrupt as the owner. I find that so stated in the very first sentence of my Lord Chief Baron's judgment, and in the observations which afterwards fell from my brother *Parks* and myself. I am still of opinion that that is the true question—and if it be so, then the intention of the bankrupt is, as it seems to me, most material, and it is not material whether it was or was not communicated to the defendants, except as a test for the jury to judge whether such intention was real or not. Here the intention is to be taken as real, and indeed the facts are abundantly clear on that point. Now, the taking possession here is by the bankrupt's agent, and the declared intention of the bankrupt to him, where he directs him to do the act, appears to me to be precisely the same as if the bankrupt had himself done the act, making the same declaration of his intention at the time. The agent has only a qualified authority, and I cannot see how, under such circumstances, his ordering the goods to be landed can be held to be a taking possession of them by the bankrupt as owner, when the bankrupt at the time declares that the agent is not to do so—that he does not mean thereby to take to the goods, but to relieve the captains from the inconvenience of the delay, leaving however the goods for Stagg, who afterwards stopped them in transitu. I place no reliance on the circumstance that, contrary to the usual course, the goods were landed without a written order—the broad ground on which I conceive the Court should decide the question is, that here the bankrupt did not take possession of the goods as owner at the wharf of the defendants, and that therefore the goods still remained at the defendants' wharf in transitu—not having arrived at

their ultimate place of destination, and not having been taken possession of by the bankrupt as owner at any intermediate place.

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For these reasons I think a nonsuit should be entered.

BOLLAND, B.—This rule calls upon the plaintiffs, the assignees of Arthur Emerson, to shew cause why the verdict obtained by them should not be set aside, and a nonsuit entered, or why there should not be a new trial. The only question in the cause was, whether the lead had arrived at its ultimate destination, and the transitus was determined. This cause was before the Court upon a former rule in Hilary Term in last year, and a new trial was granted upon the ground, that the only question that the learned Lord Chief Baron had left to the jury was, whether the defendants took possession of the goods as the agents of the bankrupt, whereas he ought to have qualified it further by calling upon them to say, whether, supposing the defendants to be the agents of the bankrupt, they received the lead to take possession of it for his benefit, or only to keep it for the seller. Upon the discussion of that rule a question was made, whether the directions given by the bankrupt to his son, whom he sent to order the landing of the lead, in which he expressed his intention not to receive it as owner, were admissible in evidence, although such directions were not communicated to the defendants, the wharfingers, nor to the seller. It appears from the judgments of the majority of the Court, that they were of opinion the directions were admissible. The learned Lord Chief Baron gave no decided opinion upon the point, although it may be collected from what he said respecting it, that he had doubts respecting its admissibility. Upon the second trial that evidence was again given, and it appears clear from the report of the testimony of the bankrupt and his son, that it was not the intention of the bankrupt, when the goods were landed at the wharf,

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to receive them as his own. In his summing up to the jury upon this point of the intention of the bankrupt, declared to his son, that he would not meddle with the goods, the learned Lord Chief Baron said that this intention, not declared to the defendants, nor to any person who was agent or could act for Stagg, was received in evidence by him with considerable doubt in his own mind whether it was admissible, but that, as it was admitted, he should submit it to them for their opinion, whether it made any difference in the conclusion to be drawn from the other evidence in the cause; that if in point of law the evidence was not admissible, and the conclusion the jury drew from it was against the plaintiffs, the plaintiffs would have an opportunity of setting it right on a motion for a new trial: if, on the contrary, they thought it made no difference in the conclusion they drew from the other facts, it would be of no prejudice even if it was not admissible; and he therefore desired them to consider what conclusion they would draw from the other evidence, and then to say whether that conclusion would be at all varied by the fact of the intention declared to the son; and he desired the jury to say, if they thought themselves bound by the other proof in the case that the transitus was at an end, and that the defendants held the goods as agents of Emerson the bankrupt, whether the declared intention to the son, not communicated to the defendants, made any difference in their conclusion; that he would not give any opinion upon it as a point of law, as the evidence, being admitted, was for their consideration: he wished only, in case they thought, as mercantile men, that such an intention communicated to the son alone ought to qualify the rights or alter the relations of the parties, they would say so, and the Court afterwards would give effect to it. The jury found for the plaintiffs, and stated that the intention of the bankrupt, expressed only to the son and not followed up by any act,

did not, and in their opinion ought not, to influence their verdict. *Each. of Pleas, 1837.*

Mr. *Alexander* had leave given to him to move, if, in the opinion of the Court, the intention so declared was evidence, and if, as a matter of law, it was of sufficient weight to entitle the defendants to a verdict.

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It is with this verdict found upon the above summing up that the Court is now to deal.

As I do not entertain any doubt that the intention of the bankrupt, in ordering the lead to be landed at the wharf of the defendants, was to place it under such circumstances as would enable the vendor to stop it, and that such intention, though not communicated to the wharfingers, was admissible in evidence, and as I consider that it was, as matter of law, of sufficient weight to entitle the defendants to a verdict, notwithstanding the other evidence in the cause, I am of opinion the rule must be made absolute for entering a nonsuit.

PARKE, B.—I am of opinion that the rule in this case should be made absolute to enter a nonsuit on the point reserved by my Lord Chief Baron; which point I understand to be this, whether, assuming that the bankrupt's intention in ordering the goods to be landed, was *not* to take possession of them on his own account as owner, does the non-disclosure of that intention to the wharfinger make any difference? I think it does not.

When this case was before the Court in Hilary Term, 1836 (a), on the first application for a new trial, this point was discussed, and I considered it to have been the opinion of the Court that the non-disclosure of that intention made no difference, when they decided that the proper question to be left to the jury was *quo animo* the act of landing by the bankrupt's order was done: was it done with intent

(a) See 1 Meeson & Welsby, 28.

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to take possession by the bankrupt as owner for his own benefit, or not? But as my Lord Chief Baron appears to have thought the question still open, and to have acted under that impression on the trial, I will state the reasons for the opinion I then formed and still retain a little more at length than I then did.

The question raised upon these pleadings is, whether the stoppage by Stagg, the unpaid vendor, took place before the transitus was at an end, and the delivery to the bankrupt complete. The defendant had the burthen of that issue cast upon him, and I think upon the evidence he did prove it.

Of the law on this subject, to a certain extent, and sufficient for the decision of this case, there is no doubt. The delivery by the vendor of goods sold to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee: but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent, to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession. Up to this point the law is clear. Whether this act of retaking rescinds the contract, or merely restores the right of possession, can hardly as yet be considered as finally determined; for even in the case of *Clay v. Harrison (a)*, where it was thought it would necessarily be decided, it became ultimately immaterial to settle it, as appears by the note of the reporter, which I know to be correct, and to contain the true ground of the judgment. It is equally unimportant in this case to give any decision upon it, though I must own I feel very little doubt upon the question.

(a) 10 B. & C. 99.

The actual delivery to the vendee or his agent, which puts an end to the transitus, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods; *Scott v. Petit* (a), *Rowe v. Pickford* (b); or at a place where he means the goods to remain, until a fresh destination is communicated to them by orders from himself: *Dixon v. Baldwin* (c); or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination.

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It is not necessary to consider, in this case, whether a vendee may take such possession before arrival at the port or place of delivery. In *Wright v. Lawes* (d), Lord Kenyon held he could; in *Holst v. Pownal* (e), that where there was a bill of lading, he could not. It is somewhat difficult to understand how a bill of lading, which is only a contract between the vendee and shipper for the carriage, can make any difference. Here, if there was a taking possession by the vendee, it was in the place of destination, in the sense in which that term is used in the latter case. In applying the law to the facts as proved, it is clear that the goods, which were put on board under a bill of lading, making them deliverable in the river Thames, were not actually delivered to the vendee or his agent whilst they remained on board the ship, though it had arrived at the end of the voyage, and at the spot where the ship-owner was, by his contract, to deliver them. The putting on board the lighters (which were hired) was not an actual delivery to the vendee, for it was only another mode of forwarding the goods a stage further. Was the landing and warehousing the goods at the wharf, by the vendee's order, a delivery of them at a warehouse or place of deposit for the vendee, or a taking possession of the goods as owner?

(a) 3 B. & B. 469.

(d) 4 Esp. 82.

(b) 8 Taunt. 83.

(e) 1 Esp. 242.

(c) 5 East, 175.

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The answer to both these questions depends upon that to a prior question,—quo animo was that act done?

If the order was given to land at the wharf, with intent to make it the place of deposit for the goods as the bankrupt's own property, at which place he meant to deal with them as his own, to sell to his customers, or to give them from thence a fresh destination, doubtless the transitus was at an end. The wharf became the warehouse of the vendee, and the landing there was a taking possession. Independently of the true nature and character of that order to land, the wharf was not the warehouse of the vendee, for though he was in the habit of using that wharf as his own warehouse, it was only when he *gave written orders to land there*, that is, he was in the habit, by an act subsequent to the shipping and arrival in the river, to select that wharf as the place of final deposit. If he did not do so, on this occasion, it was not the place of final deposit—the journey's end of the goods. On the other hand, if his intention in landing the goods had been to make the wharfinger an instrument of further conveyance to his own warehouse, then the transitus still continued; or if the goods were placed there with the intention of preventing any liability on his part to the captain for demurrage, and that they might remain in medio, or that they might remain for the benefit of the owners, the transitus had not ended; they had not arrived at the end of their journey; they were not actually delivered to the vendee or one who was an agent of his, for the purpose of keeping possession on his account.

The whole question then is, with what intent was the order to land given? Of that there is on the evidence no doubt,—the bankrupt did not mean to take possession as owner. The son, who landed the goods, was not *authorized* to take such possession. The inquiry with what intent an act is done, is a very common circumstance in the administration of the criminal law, and by no means rare

in that of our civil law. Whether a man left his house, or kept it, or assigned his goods with intent to delay his creditors, or intended to commit a fraud, are matters of ordinary occurrence; and in such inquiries, if you can be satisfied by the concomitant facts that such an intention existed, the want of a disclosure of that intention to any other person is wholly immaterial. So in this case, if the intention existed, I think the non-disclosure is wholly immaterial. The intention not to take the goods as owner was proved clearly by the bankrupt's son, and, I cannot help thinking, might have been proved by the bankrupt himself, whose evidence I think was admissible; and the only effect, as I think, of the want of disclosure of that intention to the wharfingers, was to give them rights as between themselves and the vendee, for whom they may have supposed that they were acting as warehouse-keepers, which, but for the want of that disclosure, they might not have possessed. It does not vary the rights of the unpaid vendor, which continues or not, according to the real nature of the character which the person bears, who has actual custody of the goods. The case resembles another which might occur under the same head. For example, suppose the vendee to order goods which he purchased to be left at an inn, which was also the receiving house of a carrier, for the purpose of being forwarded to his own residence, their intended place of destination; but from the non-disclosure by the vendor of that purpose, the innkeeper supposed that he was to keep the goods till the vendee came himself for them or ordered them to be sent elsewhere. There is no doubt, I apprehend, that notwithstanding such ignorance of the innkeeper of his real character, the transitus would not be at an end whilst the goods were in the innkeeper's possession.

I am of opinion, for these reasons, that the rule must be made absolute for a nonsuit.

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Lord ABINGER, C. B.—I am very sorry to be obliged to differ from the rest of the Court in opinion upon this case. The question is of very great importance; and as this may form a leading case on the subject of commercial law, the Court have given it serious attention. When the case was tried the first time, I received the declarations of the bankrupt, made to his son, with considerable doubt; I thought they were not evidence, and I omitted, in summing up to the jury, to leave any question of intention to them. When the case was moved for a new trial, that omission of mine to leave the effect of intention to the jury, was considered objectionable; and doubtless it was so, if such intention was admissible evidence. I concurred in opinion with the rest of the Court, supposing the intention to be admissible evidence, under the circumstances of the case, as they were then presented, that it was fit that a new inquiry should take place. It did not then appear in evidence in the cause, that the wharf on which the goods were landed was the usual and ultimate place in which the bankrupt received goods of that description: it was left in doubt whether that wharf, or any other wharf, might not have been selected for the purpose of landing these goods, merely to discharge the vessels of them, and with a view to remove them to the bankrupt's warehouse; and I admitted the argument, that, as long as the goods had not come into the actual possession of the bankrupt, or to the possession of some immediate agent, who was finally to receive them on his account, the transitus still continued, and therefore it was competent to the vendor to stop in transitu: and the question of whether a party who had intercepted the goods in their progress, thereby accepted them, and put an end to the transitus, necessarily involved the intention with which he took that step; and it might, therefore, be important to ascertain the reason of his interference before they came into his final possession. In other words, as there is a class of

cases where the transitus has been held to be determined by the reception of the goods at another person's warehouse on behalf of the consignee, this case might be distinguished from that class, if it appeared upon the evidence that the so receiving them was only a step in their progress to their destination, and that they were still to come to him at another place. The intention, therefore, with which he caused the goods to be landed, was important : and in that view I concurred with the rest of the Court, and a new trial was directed.

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Now, the reason for my opinion in the present case is founded upon a fact proved at the last, which did not appear on the first trial ; and that fact is this, as appears by the evidence of his son,—that the bankrupt, whenever he had any sheet lead consigned to him which he did not sell in the river, caused it to be landed at Beale's wharf, which was the last and the only place where he ever received sheet lead, where it was piled up for his use, though he had a warehouse of his own for other commodities. On the first trial, a doubt existed in my mind whether the landing of the sheet lead at Beale's wharf was not merely a step to its being carried to his own warehouse ; but upon the last trial, it being proved that, whenever sheet lead was consigned to him, Beale's wharf was the place where it was deposited, in his own name, and for his own use, there to remain until it was disposed of or sold to his customers, I consider that fact to make a very important difference, and I now proceed to mention my reasons for thinking so. I consider the law to be well settled, that in all cases of the sale and transmission of goods, the transitus is at an end when the property comes either into the actual possession of the vendee, or to that place where, by his authority, they are destined to come for his use and to await his orders ; where there is nothing further to be done with the goods but to sell them to a customer, or to apply them to his

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own use; where, in effect, there is to be no further change of possession till a change of property takes place, the transit is at an end. Now, supposing the actual transitus in this case, according to the received authorities, to be at an end; independent of the question of intention, an important question arises, which is this—whether the intention which existed in the mind of the bankrupt, at the time when the transitus was so at an end, shall alter or qualify the right of the assignees to possess these goods, or can give the right to the vendor still to obtain the possession of them. It should be observed, that in this case the books of the wharfingers, the defendants, were not produced. Notice was given to produce them; and on the argument addressed to the jury, in which, I own, I entirely concurred, the non-production of these books, which, it was clear, had been kept by the wharfinger, afforded a strong presumption that the goods, if entered in the wharfinger's books, were entered in the name of the bankrupt as his property. Now then I assume, for the purposes of this question, that the goods had arrived at the only place where the bankrupt ever intended them to arrive, and that they could not be removed from that place without some change of property, by a sale to a customer, or by his order in whose name they were entered in the books of the wharfinger, and that he alone was the person to whom the defendant was accountable by his contract, not for the further carriage, but for the safe custody of the goods.

Now, the question is, whether the mere intention existing in his mind at the time of the deposit, is competent to alter the relation of the parties. At the last trial, I left that question to the jury distinctly, giving no opinion upon it myself, as I did not wish to prejudice any opinion of theirs by any direction of mine on the subject; and they delivered their opinion strongly. They thought the intention, not declared to the wharfinger, so as to qualify

the contract by which he became the agent of the vendee, made no difference at all in the rights of the parties; and, I own, I concurred with them in that opinion.

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The question is original. The only case that I know of on which the defendants can rest as an authority is *Atkin v. Barwick* (a), which is of this description: A person residing in the west of England had purchased goods of a person living in London; before the goods arrived at his warehouse he found himself in failing circumstances, and, being an honest person, when they arrived he declined to receive them into his warehouse, and dispatched them to another man's warehouse, accompanied by a letter to that person, stating that he did not choose to receive these goods, and desiring him to hold them for the benefit of the vendor. This was before his bankruptcy. The day after the act of bankruptcy he addressed a letter to the vendors, telling them what he had done. Upon this a question arose between the assignees and the vendors. Though the report is short, it is correct as far as it goes, but I have reason to know, from some private sources, that it was argued more than once, and at great length. The only argument adduced for the assignees was this—the goods were the property of the vendee by the act of sale, they had been sent to him, and the contract which vested the property in him could not be rescinded except by the consent of both parties; and as he had become a bankrupt before he gave notice to the vendor, and before the vendor consented to receive the goods back, it became impossible for him then to rescind the contract himself, or to give the vendors a right to receive the goods, without the assent of the assignees. It was argued on the other side, that a man was to be presumed to do every thing which it is his interest to do, till the contrary appears; and therefore, as the person to whom the goods were sent by

(a) 1 Stra. 165; 10 Mod. 432, Fortesc. 353.

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the vendor had received them as the assets and for the benefit of the vendor, his consent to that matter must be presumed; and upon that latter ground the Court decided in favour of the defendant, and held that the goods were the property of the vendor. Afterwards, in the case of *Harmen v. Fisher*(a), Lord Mansfield first introduced that principle into the law of bankruptcy, that a person on the eve of and contemplating bankruptcy should not give a preference to a particular creditor by sending him back goods or paying his debt. It was obvious that the case of *Atkin v. Barwick* stood in the way of that decision; and Lord Mansfield, in order to reconcile the cases, stated, that in *Atkin v. Barwick* the judgment was right though the reasons were wrong, and stated what he conceived to be the true ground of the decision, which was this—that the bankrupt, being an honest man, when the goods arrived, refused to take them into his warehouse, or to accept them at all, or to make them a part of his effects, but sent them to another person, signifying his intention that they were to be deposited with him as the goods of the vendor, and as his agent, he, the vendee, having refused to receive them. That authority does not apply to the present case. The important fact is wanting of some declaration of the vendee to the person who received the goods, of an intention to rescind the contract, and still more of some notice to the person in whose hands he placed the goods, that he placed them there at the disposition of the vendor. In the case of *Atkin v. Barwick*, it is plain, that if the person who received the goods for the use of the vendor, had refused to deliver them to the vendor, he would have been liable to an action at the suit of the vendor, because by contract he had received them as his agent, independently of all question of stopping in transitu. In this case there is nothing which passed between the wharfinger and

(a) Cowp. 117; Loft, 472.

the bankrupt, to qualify the obligation of the wharfinger to hold the goods for the bankrupt. If he had communicated to the wharfinger that he did not wish to take the goods, but desired him to receive them till the suspense he was under was removed, and hold them in the mean time for the benefit of the vendor, the case would be very different, and would range under the authority of *Atkin v. Barwick*; but this is a case where he makes an unqualified contract with the wharfinger to receive the goods as his, and to account to him alone for them as upon former occasions, and therefore the question is whether his secret intention at the time he made that contract with the wharfinger is to make any difference? I consider it is of no importance his declaring that intention to the son: it was not declared to the wharfinger. The son stated that the father did not tell him to communicate it to the wharfinger: the fact would be the same as if the intention had merely existed in his own mind, undeclared to any body. So, the consequence would be, that in all cases where the goods of a bankrupt are not received actually into his own warehouse, and into his own manual possession, but where the transit is at an end, in the usual mode in which his business is conducted, by being received at the warehouse of another person, who by his own authority, and in his name, and for his use, received the goods, and described them as belonging to the vendee, and deposited for his use, he might afterwards come and declare that he had formed an intention at the time not to take them, and thereby divest the right of his assignees. Now, it appears to me, that whatever wish we may feel to do justice in particular cases, we ought to be especially cautious of laying down any principle in commercial law that may lead to uncertainty and litigation. One of the main advantages of jurisprudence is, that the rules of property should be certain, and litigation made as little likely to arise as possible. In this

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case it is obvious that a new element of uncertainty is introduced; and that, in every possible case where a bankruptcy intervenes, and goods are not received into the actual custody of the bankrupt, it will be in his power to make a subsequent declaration of his intention, to favour a particular creditor. I have no doubt that this will give rise to considerable litigation. The rule of law is now pretty well settled as to what shall be deemed the possession of goods by a bankrupt; it will, I apprehend, henceforward be open to doubt in many cases: and on that account, and not because I am insensible to the justice of the particular case, or that I am not most desirous, if possible, of concurring with my Brothers in opinion, it is that I find myself obliged to differ. I fear the result of this case will be, to protect an underhand intention of the bankrupt to qualify the acts done by him in making a contract with any person who may receive the goods in his name, and to account to him only.

On these grounds, although with much concern, I differ from my learned Brothers: but as the majority of the Court are of opinion that a nonsuit ought to be entered, of course that consequence must follow.

Rule absolute for entering a nonsuit.

EDMUNDS v. GROVES.

Assumpsit by
indorsee against
maker of a note.
Plea, that the
note was given

ASSUMPSIT by the indorsee against the maker of a promissory note. Plea (in substance) that the consideration for a gaming debt, and indorsed to the plaintiff with notice thereof, and without consideration. Replication, that the note was indorsed to the plaintiff without notice of the illegality, and for a good and sufficient consideration; on which issue was joined:—*Held*, that, on these pleadings, the illegal making of the note was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration; but that, in order to compel him to do so, the defendant ought to have proved the illegality by evidence.

An admission of a fact on the record amounts merely to a waiver of requiring proof of that act; but if the other party seeks to have any inference drawn by the jury from the fact so admitted, he must *prove* it like any other fact.

tion for which the defendant made the note was money lost by gaming, and that it was indorsed to the plaintiff with notice thereof, without value or consideration. Replication, that the note was indorsed to the plaintiff without notice of the illegality, and for good and sufficient value and consideration, on which issue was joined. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Easter Term, no evidence was given on either side, and under his Lordship's direction a verdict was entered for the plaintiff for the amount of the note, the defendant having leave to move to enter a nonsuit, in case the Court should be of opinion that the original illegal consideration for the note was admitted on the record, and therefore that the plaintiff was bound to have given evidence that he was a holder for value.

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W. H. Watson now moved accordingly.—By the form in which the plaintiff has chosen to reply, he has admitted the allegation in the plea, that the note was given for a gaming debt. He might have replied *de injuriâ*, and put the whole plea in issue. As he chooses to admit the fact of the illegal consideration, it must be taken as admitted with all its consequent inferences. The plaintiff, therefore, a suspicion being thus thrown upon his title, ought to have proved consideration: *Heath v. Sansom* (a). [*Alderson*, B.—The *pleadings* are not before the jury, but only the *issue*]. They *try* the issue only, but they try it with reference to the other facts appearing on the face of the record. It is very desirable that this question should be settled, in order that parties may know, when they go to trial, whether an allegation admitted on the record is to be taken as a fact proved, with all its consequences, or not.

(a) 2 B. & Ad. 291.

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LORD ABINGER, C. B.—I am of opinion that there ought to be no rule in this case. According to the recent decisions of this Court, which had the concurrence of all the Judges, I think it was incumbent on the defendant, who set up as a defence this fact, that the note came into the hands of the plaintiff with notice of its original infirmity, to have produced some evidence to prove it: or, in other words, that the onus probandi was on him. It is not necessary to say *what* evidence would have been sufficient for the purpose, until the case arises where the whole facts of the case are open on the record, so that it is for the jury to say what were the circumstances attending the inception of the instrument: the very circumstance that it was improperly obtained may cast such suspicion on the title to the note, that unless the plaintiff rebuts any inference to be drawn from his possible connexion with the party who so obtained it, by proving that he gave value, the jury may infer against him that he was so connected. But upon this issue, as it is joined here, I think it was for the defendant to give some evidence to connect the plaintiff with the parties whom he charges as being connected with the illegal concoction of the note. I wish to give no opinion in contradiction to the argument of Mr. *Watson* as to the effect of the admission of a fact on the record; but as there was no evidence given of the illegality, I think the verdict for the plaintiff was right. It may be worth consideration whether the act of Parliament (a) which professes to render securities given for gaming debts available in the hands of a holder for value, really has that effect. I give no decided opinion upon that: if however it has not, the question is on the record.

BOLLAND, B.—I am of the same opinion. This was the defendant's averment, and I think he ought to prove it.

(a) 5 & 6 Will. 4, c. 41.

ALDERSON, B.—In this case the defendant pleads that there was a gambling transaction between him and a third person, and that the note was given in respect of that transaction, and was indorsed over to the plaintiff with full knowledge on his part of the illegal transaction, and without consideration. The plaintiff replies that he had no knowledge of the illegal transaction, and that he gave consideration. That Mr. *Watson* calls an admission on the part of the plaintiff sufficient to raise an inference against him of the existence of facts passing between the defendant and a third person. I apprehend that he is totally wrong in his conception of the effect of an admission on the record. An admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but if any inferences are to be drawn by the jury, they must have the facts from which such inferences are to be drawn proved like any other facts. If that be so, there was nothing to go to the jury in this case from which they could draw the inference of fact that the note was illegal in its inception. The defendant therefore having given no evidence, the plaintiff was entitled to a verdict.

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Rule refused.

In the Matter of ROBERT THOMPSON.

THIS was an application to set aside a writ of privilege which had been issued under the following circumstances:—Robert Thompson, one of the clerks in the Remembrancer's office of the Exchequer, was sued in Chancery jointly with other parties who were not entitled to privilege. It appeared that Thompson was not personally interested in these proceedings, but was made a party to the suit on

A general writ of privilege operates merely as a notice that the party is entitled to the privilege of the Court, and does not operate as an injunction; and therefore it is irregular to move to set it

aside, even though it is sued out in a case in which the officer is not entitled to privilege.

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the ground of his being one of the personal representatives of a trustee of a term of years. Mr. Thompson having been served with a subpoena issuing out of Chancery, his solicitor wrote to the solicitor of the plaintiff in the suit, insisting on Mr. T.'s privilege of being sued in the Court of Exchequer alone, and informing him that, unless the proceedings in Chancery were abandoned, the necessary steps would be taken to put a stop to them. A writ of privilege was accordingly issued, which was as follows:—

“ William the 4th, &c. To all to whom these present letters shall come, greeting. Whereas, as well from our royal dignity as from ancient custom, in consequence thereof used time beyond the memory of man hitherto, it hath obtained that the Barons of our Exchequer, the clerks residing there, and all other ministers officiating thereof, whether they be of the clergy, or such others as belong to the King's court who assist there by command, should not be required to appear out of the said Exchequer for any causes before any judges whatsoever, or the very judge before whom the suit should be depending, whether ecclesiastical or secular; and that if they should happen to be cited by reason of any power granted by the Crown, they should, by public authority, be excused; and that the same persons should be free and acquitted from all common juries, suits of court in the county court, hundred court, and other courts whatsoever, as well held for and in their lordships as elsewhere, within their fees; and likewise from minderwite exercises, watchings, and dane-gelts; and also from any provision or purveyance, and other payments by name of customs, for any victuals whatsoever, for their own houses, brought in any cities, castles, or maritime places whatsoever; and from any other assarts of their own demesnes, and from the payment of any toll or custom, and that they should not be impleaded elsewhere than in the Exchequer aforesaid, so long as the said Exchequer shall be open, as appears by the inspection of

the red book of our Exchequer, under the title relating to the rights and privileges of the residents of the Exchequer, which King Henry the First by writ granted for the perpetual exemption of such as assist there. We therefore command you, and strictly enjoin, not to molest or permit to be molested, as far as in you lies, Robert Thompson, Esq., one of the clerks in the office of his Majesty's Remembrancer of our Exchequer at Westminster, whose continual residence is there required, contrary to the tenor of the privileges aforesaid, nor compel him to execute any office, but to cause him to have firm quiet in that respect, under the penalty that shall befall thereon; and if, on these occasions, or any of them, ye shall have taken any distress or provision from the said Robert Thompson or his servants, that ye cause the same to be restored to him without delay; or if ye have arrested the said Robert Thompson, that ye forthwith suffer him to go at large, upon the pain that shall befall thereon. In witness whereof we have caused these our letters to be made patent. Witness, James Lord Abinger, at Westminster, the 31st day of January, in the 7th year of our reign, by the tenor of the red book, and by the Barons.—VINCENT."

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Simpkinson and *Beavan* now moved to set the writ aside.—This writ was improperly issued. In 17 Viner's Abr. tit. Privilege, p. 524, pl. 26, it is said that the Lord Chancellor Egerton declared that "no Chequer man is privileged against a subpœna of the Court of Chancery," and several pleas by officers there, as Register, Receiver, &c., have been overruled. But secondly, were the law otherwise, it only applies to cases where the officer is sued solely, and not conjointly with others who are not entitled to privilege (a). *Fanshaw v. Fanshaw* (b), *Powle's case* (c),

(a) Viner's Abr., Privilege, Vol 17, p. 521, pl. 8, and p. 523, pl. 19. (b) 1 Vernon, 246. (c) Dyer, 377.

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Molyn v. Cooke (a), Roberts v. Martin (b), Ramsbottom v. Harcourt (c). Besides, Thompson is only entitled to avail himself of his privilege where he is personally sued, and not where he is sued in his representative character as executor or trustee.

C. P. Cooper and Bacon, contrà.—The application to set aside this writ cannot be supported. It has been said, that where a defendant entitled to privilege is sued with others, or in his representative character as executor, he cannot claim his privilege. The authorities on this point are very conflicting; but there are decisions in Chancery, in the Common Pleas, and in the King's Bench, where the privilege has been held to extend to cases of that nature (*d*). The Courts, in determining this question, have considered whether the party can have the same remedy in the Court where he is sued as in the Court where the privilege is claimed. In the Court of Exchequer, there is both an equity and common-law jurisdiction, which differs it from the Courts of Chancery, King's Bench, and Common Pleas. The Court of Exchequer could deal with this matter as well as the Court of Chancery. In Gilbert's Common Pleas, 209, speaking of the privilege of officers not to be drawn out of their own Courts, it is said, "But this is to be understood when the plaintiff can have the same remedy against the officer in his own Court as in that where he sues him;" and numerous examples are put to illustrate that position. In the Court of Exchequer the privilege is more extensive than in the other Courts (*e*). But, secondly, the present application is irregular, because this writ is not in the nature of an injunction, but a mere general notice what the privileges of the Exchequer are, and that Thompson was entitled to those

(a) 1 Ventr. 298.

(b) 1 Taunt. 254.

(c) 4 Mau. & Selw. 535.

(d) Viner's Abr. Privilege, G.

(e) 1 Burton's Exchequer Practice, p. 45 and 48.

privileges. The plaintiff would not incur a contempt of this Court by proceeding in the suit notwithstanding the service of the writ upon him. There is nothing in this writ relating to the Chancery suit in question, and it is not at all in the nature of an injunction. As far as that suit is concerned, it is a sheet of waste paper until Mr. Thompson chooses to adopt ulterior proceedings. In *Crossley v. Shaw* (a), it was held that an attorney of the King's Bench, arrested by capias on a special original out of the same Court, was not entitled to his discharge by serving the sheriff with his writ of privilege, but that he must plead it. So in *Snee v. Humphreys* (b), and *Mayor of Basingstoke v. Bonner* (c), it was held that an attorney must plead his privilege, and that he cannot be discharged on motion. This writ is distinguishable from the writ of injunction of privilege, which restrains the party by name from proceeding in the suit.

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Simpkinson, in reply.—The plaintiff was bound to obey this writ, with which he has been served. By the terms of the writ he is commanded “not further to molest” Mr. Thompson, “upon the pain that would befall thereon.” The plaintiff could not, therefore, proceed in his suit, both out of respect to the Court out of which the writ issued, and by reason of the consequence which would result therefrom. Suppose the plaintiff had attached Thompson in the Court of Chancery, he would have disobeyed the writ and been guilty of a contempt. In Wyatt's Practical Register, 314, it is said, “If an officer refuse to allow or disobey a writ of privilege, or require bail before he will discharge the parties, it is a contempt, for which many have been committed.” It is clear that such was the construction put upon it by Mr. Thompson's solicitor, who in his letter treats it as the necessary step “to put a stop to the plaintiff's proceedings in the suit.”

(a) 2 W. Black. 1085.

(b) 1 Wils. 306.

(c) 2 Stra. 864.

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LORD ABINGER, C. B.—I am of opinion that there is no ground for this application. The motion is founded on a misapprehension of the nature of the writ. It is no injunction, which prevents the plaintiff from proceeding, but is nothing more than a document under the authority of this Court, attesting who the party is, and what his general privileges are. This writ does not at all add to or take away any privilege which the defendant has, or any power he has of pleading it. It does not apply to the particular cause. We are asked to set aside this writ of privilege; but we cannot do so, as it may be of use to the defendant in another cause. The application must therefore be dismissed; but as it appears that the defendant attempted to avail himself of the writ to stop the proceedings, we think there should be no costs.

The rest of the Court concurred.

Rule discharged, with costs.

WHEATLEY v. PATRICK.

A. borrowed of B. a horse and chaise, and went in it, accompanied by C., on an excursion of pleasure, C. driving. By C.'s mismanagement, the horse and chaise were driven against and injured the plaintiff's horse:—*Held*, that an action on the case might be maintained for the injury against A., on a declaration charging that he was possessed

CASE.—The declaration stated that at the time of committing the grievances &c., the plaintiff was possessed of a horse, at that time drawing in an omnibus, and that the defendant was possessed of a horse then harnessed to and drawing a chaise of the defendant, which chaise and horse were under the care, management, government, and direction of the defendant, who was driving the same; yet that the defendant so negligently and improperly drove and directed the said chaise and horse, that, by reason of the negligence and improper conduct of the defendant, the defendant's said chaise ran and struck against the plaintiff's said horse, and killed it. Plea, not guilty.

At the trial before the Lord Chief Baron, at the Middle-

sex he was possessed of and driving the horse and chaise, and that by his negligent driving the injury was occasioned.

sex Sittings after Easter Term, it appeared that the defendant had borrowed a horse and gig of Messrs. Delafosse & Co., and that a Mr. Nicholls accompanied the defendant in it on an excursion into the country. As they were returning home, Mr. Nicholls driving, and the defendant sitting with him in the gig, the accident happened which was the subject of the action. It was objected for the defendant, that these facts did not sustain the allegation in the declaration, that the horse and chaise were under the direction of, and driven by, the defendant. His Lordship however thought the proof sufficient, and directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit, if the Court should be of opinion that he was not liable under the circumstances.

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Sir *W. Follett* now moved accordingly.—The declaration states in express terms that the chaise was driven by the defendant. The question therefore is, was the driving by Nicholls in effect a driving by the defendant? The ground of responsibility for the wrongful acts of third parties is their liability over for the damages: that would not apply here. A master is liable for the wrongful act of his servant, but then he would have an action over against him. So, a stage coachman's suffering another person to drive being a breach of his duty, the coach proprietor would have an action over against him. But here there was no implied undertaking by the defendant to Delafosse & Co. that he should himself drive: they would therefore have no right of action against him for suffering Nicholls to drive. Why should not the plaintiff have sued the party who actually did the injury? *Williams v. Holland* (a) decided that case lies against a party by whose negligence an injury, not wilful, is occasioned, though it be an immediate injury. This case is different from that of *Laugher v. Pointer* (b), because the defendant is not charged as having driven by his servant.

(a) 10 Bing. 112; 3 M. & Scott, 640. (b) 5 B. & Cr. 547.

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LORD ABINGER, C. B.—I think there is no ground for the objection taken in this case. The declaration charges that the defendant was possessed of the horse and chaise, and that they were under his direction. The defendant having borrowed them for his own enjoyment, and not to use them for the service of the owner, is very properly charged as in the possession and control of them. Then the question is, whether, being so in possession of them, and sitting with the driver of them, he may not be charged as actually driving? I think he may. As against all the world but Delafosse & Co., he is the party in possession: he is present, he has the actual control, and he permits another person to drive. I think an action might have lain against him, alleging that Nicholls, by his consent, had driven improperly, and thereby occasioned the injury.

BOLLAND, B.—The question is not to be decided by the test whether the defendant would have an action over, because, undoubtedly, I think he would not have any right of action against Nicholls. But the defendant having suffered Nicholls to drive, must be taken to have had the management of the chaise, and to be liable for Nicholls' act.

ALDERSON, B.—The only plea here is not guilty; the possession by the defendant is therefore admitted on the record, and the only question is, whether there was negligent driving by the defendant, which I think is made out by the proof that he allowed Nicholls to drive, and that the injury was occasioned by his mismanagement. He is liable, under the circumstances, for the act of Nicholls.

GURNLEY, B., concurred.

Rule refused.

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JOHNSON and Others *v.* DODGSON.

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, non-assumpsit. At the trial before Lord Abinger, C. B., at the London Sittings after last Hilary Term, it appeared that the action was brought to recover the sum of 246*l.* 19*s.* 9*d.*, being the price of 31 pockets of Sussex hops, sold by the plaintiffs, hop merchants in London, to the defendant, a hop merchant in Leeds, under the following circumstances:

The plaintiff's traveller, one Morse, called on the defendant at Leeds, with some samples of hops, and agreed with him for the sale of the hops in question. The defendant then wrote the following memorandum in a sample-book of his own, which he retained in his own possession:—

“ Leeds, 19th October, 1836.

“ Sold John Dodgson,

27 pockets Playsted, 1836, Sussex, at 103*s.*

The bulk to answer the sample.

4 pockets Selme, Beckley's, at 95*s.*

“ Samples and invoice to be sent per Rockingham Coach. Payment in bankers' at two months.

“ Signed for Johnson, Johnson, & Co.

“ D. Morse.”

The signature was added, at the defendant's request, by Morse. On the same evening the defendant wrote to the plaintiffs the following letter:—

The defendant, on the same day, wrote to the plaintiffs, requesting them to deliver “ the 27 pockets Playsted and the 4 pockets Selmes, 1836, Sussex,” to a third party. Quære, whether this letter sufficiently referred to the contract in question, so as that it might have been connected with the entry in the book, for the purpose of constituting a memorandum of the contract within the statute.

The bulk samples and invoice were sent to the defendant by the coach, pursuant to the contract, but he returned them as not answering to the samples by which he bought. The jury, in an action for the price of the hops, found that the samples *did* answer the contract:—*Held*, that there was no acceptance of the goods within the Statute of Frauds.

Semble, the defence that there has not been a sufficient memorandum in writing of a contract to satisfy the Statute of Frauds, may be taken under the general issue, without being specially pleaded.

The traveller of the plaintiffs, hop merchants in London, agreed with the defendant, at Leeds, for the sale to him, by sample, of a quantity of hops. The defendant wrote in his own book, which he kept, the following memorandum:—
“ Leeds, 19th Oct. 1836. Sold John Dodgson (the defendant) 27 pockets Playsted, 1836, Sussex, at 103*s.*; 4 pockets Selme, Beckley, at 95*s.* The bulk to answer the sample. Samples and invoice to be sent per Rockingham coach. Payment in bankers' at two months.” This was signed by the traveller on behalf of the plaintiffs:—*Held*, that it was a sufficient memorandum in writing of the contract, within the Statute of Frauds.

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" Leeds, Wednesday evening,
" 19th October, 1836.

" Gentlemen,

" Please to deliver the 27 pockets Playsted, and the 4 pockets Selmes, 1836, Sussex, to Mr. Robert Pearson or bearer, to be carted to Stanton's wharf: 20 pockets of Playsted to be forwarded per first ship, and the remaining eleven pockets per the second ship, and you will oblige, Gentlemen,

" Your most obedient,
" John Dodgson."

Bulk samples were sent, pursuant to the contract, by the Rockingham Coach, and reached Leeds on the 24th of October, but were returned by the defendant, as not answering the samples by which he bought from Morse. There was much conflicting evidence as to whether there had or had not been a substitution of inferior samples in lieu of the genuine ones; that question was left to the jury, who found it in favour of the plaintiffs. For the defendant, it was objected that there was no sufficient memorandum of the contract in writing to satisfy the Statute of Frauds; the entry in the defendant's book not being signed by him, and his subsequent letter not referring (as it was contended) in sufficiently express terms to that entry as that it might be connected with it. This point was reserved, and accordingly, in Easter Term,

Cresswell obtained a rule nisi for entering a nonsuit; against which

Thesiger (with whom were *Erle* and *Evans*), now shewed cause.—The entry in the defendant's book, being written by the defendant himself, and signed by the plaintiffs' agent, constituted of itself a complete contract, so as to satisfy the statute. It is clear that it matters not in what part of the document the signature appears. In

Saunderson v. Jackson (a), a bill of parcels, in which the vendor's name was *printed*, delivered to the vendee at the time of an order for the delivery of goods, was considered to be a sufficient memorandum of the contract within the statute. So, in *Schneider v. Norris* (b), a bill of parcels, in which the vendor's name was printed, and that of the vendee *written by the vendor*, was held sufficient. But, at all events, the subsequent letter of the defendant clearly refers to this contract, and being connected with it, the two together beyond doubt constitute a sufficient note of the contract within the statute. It may be conceded, that if its application to the particular contract be doubtful, it cannot be pieced out by parol evidence. But it is impossible to doubt that the defendant, when, on the same day, he speaks of *the 27* pockets Playsted and 4 pockets Selmes, is referring to the subject-matter of this particular contract. In *Allen v. Bennett* (c), the agent of the seller had written in a book of the buyer an order for 50 barrels of rice, at a certain price, and shortly afterwards, two several similar orders for 12 cwt. and for 8 cwt. of tobacco, but not naming the buyer; and it was held, that a subsequent letter from the buyer to the seller, in which he said—"the 8 cwt. of fine shag tobacco I wish immediately forwarded, as I have sold it, and it is wanted: I likewise want the invoice of the rice and the other tobacco"—might be connected with the orders, so as to make a complete contract within the statute. The present case is a stronger one than that. In *Jackson v. Lowe* (d), the buyer wrote to the sellers as follows:—"I give you notice that the corn you delivered to me, in part performance of my contract with you for 100 sacks of good English seconds flour, at 45s. per sack, is of so bad a quality that I cannot sell it. The sacks of flour are at my shop, and you will send for them, or I shall com-

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(a) 2 Bos. & P. 238.

(b) 2 M. & Sel. 286.

(c) 3 Taunt. 169.

(d) 1 Bing. 9; 7 Moore, 219.

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menace an action." The sellers answered, by their attorney, that "Messrs. L. & L. considered they had performed their contract," &c. : and it was held, that the jury were warranted in concluding that both documents referred to the same contract, and therefore constituted together a sufficient memorandum of it. [*Parke, B.*—That case is stronger than this, because there the seller's letter distinctly refers to the buyer's.] But there is a further question, whether there has not been an acceptance of the goods by the defendant. If the bulk answered the samples as the jury have found, the delivery of the bulk samples to the carrier would be a complete delivery of the goods. [*Parke, B.*—How can you say that there was an acceptance, when the defendant expressly says he will not accept? The delivery to the carrier may be a delivery to the defendant, but the acceptance of the carrier is not an acceptance by him. The old cases, in which it had been said that a receipt by a carrier was an acceptance to satisfy the statute, were overruled by *Howe v. Palmer* (a), and *Hanson v. Armitage* (b). Lord Alinger, C. B.—If, to take the strongest case, the purchaser sent his own servant for the goods, and when they were brought, sent them back as not answering the contract, he could not be said to accept them.]

Lastly, there being no plea but that of the general issue, the defendant was precluded from taking the objection that there was no note in writing within the Statute of Frauds. The enactment of the 17th section is, that no contract for the sale of goods for 10*l.* or upwards *shall be good* except there be some note or memorandum of the contract in writing, &c. That is equivalent to saying that the contract shall otherwise be void. But the new rule (c) expressly directs, that all matters which shew the transaction to be void or voidable in point of law, shall be

(a) 3 B. & Ald. 321.

(b) 5 B. & Ald. 559.

(c) H. T. 4 Will. 4, Assumpsit, 3.

specially pleaded. And the Court of Common Pleas accordingly so determined a similar question in *Barnett v. Glossop* (a). [Parke, B.—Suppose it were a declaration for an estate bargained and sold,—would it not be competent to the defendant, under the general issue, to shew that there had been no conveyance? Lord Abinger, C. B.—When by law you cannot make a particular contract except in writing, to deny the writing is to deny the contract. Unless you have very little confidence in your first point, you had better not press this. We will hear Mr. Cresswell, and if it become necessary, we will afterwards hear you on this point.]

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Cresswell and *Wightman*, in support of the rule.—First, the entry in the defendant's book was not of itself a sufficient memorandum of the contract. There is no case in which the party has been charged by any such entry, unless he professed to introduce his own signature *as binding himself*. If he writes, "I, A. B., agree" &c., he avowedly introduces his own name as the party agreeing and bound. The cases cited on the other side are distinguishable: those were cases of documents which the party charged had delivered over to the other contracting party. [Parke, B.—The handing over of the document was used merely to shew the recognition by the party of the particular mode of signature.] Here all is done *diverso intuitu*. The document is signed by the plaintiffs' agent, for their protection, not by the defendant as a party to be charged. There is not a word intimating that he has *bought*: the operative part is the signature of Morse, whereby he says, on behalf of his employers, that they have *sold*. Suppose the defendant had simply made a memorandum in his own book, that on such a day the plaintiffs sold to him; would that be sufficient? [Parke,

(a) 1 Bing. N. C. 633; 1 Scott, 621.

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B.—If he meant it to be a memorandum of the contract between the parties, it would; not so if he meant it to be a mere memorandum to be kept by him for himself.] In *Saunderson v. Jackson*, Lord *Eldon* did not expressly hold the bill of particulars alone sufficient, but only by the addition of the subsequent document referring to it. This is like the case of taking a sold note without the exchange of a counter bought note.

Secondly, the defendant's letter contains no *certain* reference to this particular contract. *Jackson v. Lowe* and *Allen v. Bennett* are distinguishable. The latter case, however, decided that it could not be assumed to be the purchaser's order, though it was entered in his book: that shews that every thing required by the statute must specifically appear to have been complied with. This letter has no reference to any price, or time for delivery, or period of payment. If it had said, "the hops for which I bargained with your traveller to-day," there would have been a distinct reference to the particular transaction. The certainty of the reference must be such as will exclude the Court from the necessity of inquiring by parol evidence what particular contract the document refers to (a). Here parol evidence must be introduced to shew that there was only one such contract. [Lord *Abinger*, C. B.—The statute does not absolutely exclude parol evidence; it only requires that there shall be a note of the contract in writing, in order to exclude fraud or mistake as to its terms.] If the document point specifically to any particular contract as made, the Court may inquire by parol whether such contract was made in fact. But suppose the letter were merely in these terms—"Please to deliver *the hops* to A. B.;" if parol evidence be admissible here, so would it also there. The question would arise, what hops? then evidence is let in of the purchase of these

(a) See *Hinde v. Whitehouse*, 7 East, 558.

particular hops. It would be impossible to draw the line as to what might or might not be supplied by parol evidence. It has been decided, under Lord Tenterden's Act, that a letter from the party charged must refer specifically to the particular debt, in order to take it out of the Statute of Limitations (*a*). [*Parke, B.*—That is questionable; *Lechmere v. Fletcher* (*b*).] Unless the subsequent document refers in specific terms to the former one, it cannot become *part of it*, so as to constitute it a sufficient contract in writing.

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LORD ABINGER, C. B.—I think this is a very clear case. If it rested upon the question as to the recognition of the contract by the letter, there might have been some doubt; although, even upon that, I should have thought the reference to the only contract proved in the case sufficient. But, on the other point, it really seems to me one of the strongest cases that have occurred. The Statute of Frauds requires that there should be a note or memorandum of the contract in writing, signed by the party to be charged. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing shewing the terms of the contract, and recognised by him. I think in this case the requisitions of the statute are fully complied with. The written memorandum contains all the terms of the contract; it is in the defendant's own hand-writing,

(*a*) See *Kennett v. Milbank*, 1 M. & Scott, 108; 8 Bing. 37.

(*b*) 1 Cr. & M. 623.

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PAKKE, B.—I am of the same opinion, and think this was a sufficient memorandum in writing. The defendant's name was contained in it, in his own hand-writing, and it was signed by the plaintiffs. The point is in effect decided by the cases of *Saunderson v. Jackson* and *Schneider v. Morris*. There the bills of parcels were held to be a sufficient memorandum in writing, it being proved that they were recognised by being handed over to the other party. Here the entry was written by the defendant himself, and required by him to be signed by the plaintiffs' agent. That is amply sufficient to shew that he meant it to be a memorandum of contract between the parties. If the question turned on the recognition by the subsequent letter, I own I should have had very considerable doubt whether it referred sufficiently to the contract: it refers to the subject-matter, but not to the specific contract. But it is unnecessary to give any opinion upon that, because on the former point I think there is a sufficient note in writing.

BOLLAND, B.—I am of the same opinion, that the entry made by the defendant was a sufficient memorandum in writing: and if it were necessary to decide the other point, I should also be inclined to think the letter sufficiently connected with the contract.

Rule discharged.

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DOE on the several demises of THOMAS WYTHE and MARY his Wife, and of MARY DROSIER, HENRY TUTHILL, and JOHN WARNES, v. MARGARET RUTLAND.

EJECTMENT to recover possession of an estate in the county of Norfolk, called "The Testerton Estate." On the trial before *Tindal, C. J.*, at the Norfolk Summer Assizes, 1836, the jury found a verdict for the lessors of the plaintiff, subject to the opinion of the Court upon the following case:—

Benoni Mallett, who at the time of making his will hereinafter mentioned, and from thence until and at the time of his death, was seised in fee of the said estate, and of an estate also in the said county called or known by the name of the Middleton estate, and of other lands in the same county, by his will dated January 28th, 1780, and duly executed to pass real estates, devised the two several estates above mentioned to trustees for a term of 500 years, upon certain trusts, which term, for the purposes of this action, is to be deemed to be determined; and subject to the said term, devised the Middleton estate to uses, by virtue whereof Mary the wife of Thomas Wythe, lessors of the plaintiff, became, on the death of her father Thomas Mallett Case, upwards of thirty years ago, tenant in tail in possession of that estate: and devised the Testerton estate, under the following description, viz.—"All that my manor of Testerton in the county of Norfolk, together with the perpetual advowson and right of patronage to the church of Testerton, and all and singular my messuages, lands, tenements, and hereditaments whatsoever, situate, lying, and being in Testerton, Ryburgh, and Colkirk, in the said county of Norfolk," to the use of the said testator's

A testator, by his will, empowered his devisee for life of real estate to demise and lease for 21 years, "so as upon such lease there were reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and that in every such lease there should be contained a clause of re-entry for non-payment of the rent." In exercise of this power, a lease was made for 21 years, to hold from the 11th October, 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, viz. on the 6th of April and the 11th

of October in every year by equal portions, *except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the term.*" The lease also contained a proviso for re-entry, if the rent should be unpaid for forty-two days after it became due:—*Held*, that the lease was a good execution of the power.

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grandson Philip Mallett Case for life; remainder to his first and other sons in tail male; remainder to his daughters in tail general; remainder to the testator's grandson Thomas Mallett Case for life; remainder to his first and other sons in tail male; remainder to his daughter in tail general; under which last limitation the said Mary the wife of Thomas Wythe became, on the death of her uncle the said Philip Mallett Case, on July 4th, 1831, without issue, tenant in tail in possession of the Testerton estate; but as to the premises mentioned in the declaration, subject, as the defendant contends, to the lease hereinafter mentioned.

The above will contained the following power of leasing, viz.—“ Provided always, and my will is, that it shall and may be lawful to and for my said grandsons Thomas Mallett Case and Philip Mallett Case, and all their sons, and all other person or persons respectively as and when they shall respectively come into and be in the actual possession of my said hereinbefore devised manors, estates, and premises, including the said Middleton estate and Testerton estate, or any part thereof, or be actually entitled to the rents and profits thereof or of any part thereof, by indenture under their respective hands and seals, to demise and lease the same or any part thereof unto any person or persons, for any term or number of years not exceeding twenty-one years, in possession, and not in reversion, remainder, or expectancy, *so as upon every such lease there be reserved and be made payable, during the continuance thereof respectively, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases,* and so as none of the said lessee or lessees be made dispunishable of waste by any express words therein; *and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved,* and so as such

lessee or lessees to whom such lease or leases shall be made seal and deliver counterparts of such lease or leases."

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On the 14th of December, 1833, the said Philip Mallett Case, being then in the actual possession, or actually entitled to the rents and profits of the Testerton estate under the limitations of the will, signed and sealed, in the presence of two credible witnesses, an indenture of lease of that date between the said Philip Mallett Case of the one part, and Margaret Rutland, the defendant in this action, who then and there sealed and delivered a counterpart thereof, of the other part, whereby it was witnessed, that by virtue of the power of leasing in the said will contained, and in consideration of the rents, covenants, and agreements in the said lease reserved and contained on the part of the said Margaret Rutland, the said Philip Mallett Case demised unto the said Margaret Rutland the premises therein mentioned, being the premises mentioned in the declaration in this action sought to be recovered, the said indenture containing therein, amongst other things, as follows:—"To have and to hold the said premises unto the said Margaret Rutland, and her executors, administrators, and assigns, from the 11th day of October last, for and during the term of twenty-one years thence next ensuing, yielding and paying therefore unto the said Philip Mallett Case and his assigns, during such part of the term of this demise as he shall live, and after his decease, unto such person or persons as for the time being shall be entitled to the reversion of the said premises, the yearly rent of 90*l.* of lawful money current in Great Britain, by equal half-yearly payments, viz., *on the 6th day of April and the 11th day of October in every year, by equal portions, except the last half year's rent, which is hereby reserved and agreed to be paid on the 1st day of August next before the determination of the said term, which said rent hath been adjudged by two indifferent and skilful persons, viz.*

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Messrs. William Wright and Edward Seppings, to be the full annual value of the said premises. *Provided always, that if the said rent or any part thereof shall be unpaid for forty-two days next after any of the days whereon the same is reserved to be paid as aforesaid,* or if the said Margaret Rutland, her executors, administrators, or assigns, shall not perform the covenants herein contained which on her or their part ought to be performed, then and in either of the said cases it shall and may be lawful for the said Philip Mallett Case, or his assigns during his life, and after his decease for such person or persons as aforesaid, into the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the said Margaret Rutland, and her executors, administrators, and assigns, and all other occupiers thereof, to expel, put out, and remove therefrom."

The said lease contained the following covenant on the part of the lessor, P. M. Case, for himself and his assigns, and for the person or persons who from time to time after his decease should be entitled to the reversion or inheritance of the said premises:—That it shall be lawful for the said Margaret Rutland, and her executors, administrators, and assigns, paying the rent and performing the covenants herein contained which on her or their part ought to be performed, to hold and enjoy the premises hereby demised during the said term of 21 years, and to use the barns and the stack yards thereto belonging, for the purpose of thrashing and dressing the corn, grain, and pulse which shall be produced from the said premises in the last year of the said term, until the 1st day of August next after the determination thereof, without interruption:—and there were also all the usual and necessary covenants on the part of the lessee. Supposing the Court to be satisfied that the covenants herein stated are of that description, it is also agreed that no question shall be raised or considered as to the amount of the rent.

The defendant was in possession of the premises in the lease and declaration mentioned at the commencement of this action, and claimed to hold the same under the lease. She had been served with a regular notice to quit, which had expired before the day of the several demises laid in the declaration.

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On the part of the defendant, evidence was tendered to shew the usage of the country about Testerton as to agricultural leases of land in that neighbourhood, with respect to reservations of rent, and covenants of a like description with those in the present lease. The evidence was objected to, but received by the learned Judge, subject to the opinion of this Court as to its admissibility in whole or in part.

The question for the opinion of the Court was, whether the lease of the 14th December, 1833, was a valid execution of the power of leasing contained in the will of Benoni Mallett.

Sir *W. Follett*, for the lessors of the plaintiff.—The first objection to this lease is, that the reservation of the last half-year's rent is not a valid reservation within the terms of the power. Under this power, the rent must be reserved equally throughout and during the continuance of the whole term; but by this lease no rent would be payable from the 1st of August to the 11th of October in the last year. The tenant for life has no right to reserve rent by anticipation. If he should die in the interval between the 1st of August and the 11th of October in the last year of the term, he would receive all the benefit of the rent for the whole of that year, and the remainder-man would be kept out of possession, without receiving any rent. It is just the same as if it had been reserved on the first day of the year. The intention of the power is, that the tenant for life should receive rent for that part of the term which runs through his life, and the remainder-man for that

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which comes after. The case of *Doe v. Giffard*, cited in *Doe v. Wilson (a)*, is in point. There, the power required the best and most approved yearly rent to be reserved. The lease was dated the 14th of September, 1809, and was for twenty-one years from the date, payable by two equal half-yearly payments, on the 29th of September and the 25th of March, the first payment to be made on the 25th of March then next; and the lease was held void, because there would be no rent payable under it from the 25th of March preceding the expiration of the term. [*Parke, B.*—There, there was a clear loss of one half-year's rent. The distinction between that case and this is—in this case, there can only, at most, be said to be a reservation of rent at an improper time of the year; in that case, by the terms of the lease, not twenty-one years' rent, but only twenty and a half, was reserved.] The rent was not reserved equally throughout the term. Has the tenant for life, under this power, a right to reserve the whole rent payable in one day? That might be a beneficial reservation, but it would not be allowed. In *Doe v. Morse (b)*, the power required that there should be reserved, during the continuance of the lease, by half-yearly payments, the best and most improved rents that could be obtained: the lease was dated the 11th of January, 1783, to hold from the 4th of January preceding, reserving the rent payable on the 1st of May and the 29th of September, the first payment to be made on the 1st of May then next: and it was held not a due execution of the power. *Bayley, B.*, there says: "According to the terms of the power, the party is to reserve the best yearly rent. That cannot be considered the best yearly rent which is not reserved at the conclusion of the year." And again—"In this lease the first rent was payable long before a half-year's occupation had elapsed, and the second very long before a

(a) 5 B. & Ald. 371.

(b) 2 Cr. & M. 247.

year's. The tenant for life might thereby obtain a year's rent for less than a year's occupation." All that reasoning applies to the present case. [*Parke, B.*—There is one advantage to the landlord in this case, which he would not otherwise have had, if the rent had been reserved payable the last day of the term, namely, he could not have distrained for it. The case of *Doe v. Morse* is distinguishable from the present; but what is said by Mr. Baron Bayley is undoubtedly in your favour.] Secondly, as to the power of distress and re-entry. In Sugden on Powers, 641, (4th ed.), the law upon this subject is fully treated of, and it is laid down, that a *reasonable* time is allowed, and that the law will take notice what is a reasonable time: *Jones v. Verney* (a), *Smith v. Doe* d. *Lord Jersey* (b). The usual period is 21 days, and no case has hitherto decided that so long a period as 42 days is a reasonable time.

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[The argument on the question as to the admissibility of the leases is omitted, as the Court gave no judgment on that point.]

Maule, contra.—The sound rule of construction is, that where the party creating the power has expressed a condition, or number of conditions, those conditions must be complied with; but when he leaves the exercise of the power at large, on those points where he has expressed no conditions, none can be interpolated into it, except the intention be manifest upon a due construction of the whole instrument. In this case, it is conditioned that the rent should be reserved and made payable during the continuance of the term, and that it should be the best improved yearly rent that could be reasonably obtained. Those express conditions are so far admitted to have been complied with; but it is argued that the lease does not

(a) Willes, 169.

Moore, 339; 3 Bligh, 290; 7

(b) 2 Brod. & Bing. 473; 3 Price, 281.

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satisfy some condition that is to be reasonably implied.

Where a condition is not expressed, it cannot be interpolated into the power, except it be reasonable with respect to the matter in question. But what is there unreasonable in reserving the rent payable on the 1st of August in the last year of the term? It is argued as if it must be assumed to be a bad execution of the power, if by any chance, or in any event, the remainder-man may be put in a worse situation; but there is no such rule. The true criterion is, whether the tenant for life would have been prudent in making this reservation, if he had also been remainder-man. Here the lessor would have done in that case precisely what he has done in this, as he has secured his remedy by distress, which he would have lost if the rent had been reserved payable the last day of the term. The lease terminates on the 11th of October, by which time all the crops would have been got off the farm, and the landlord might be otherwise entirely without remedy. It was therefore beneficial for the landlord. Besides, if the tenant for life were to die just before the last half-year's rent became payable, the remainder-man would be benefited by this reservation, and the probabilities are more in favour of his being benefited in that case, than injured by the only possible contingency happening in which it might be injurious to him; for one only has been suggested, namely, the tenant for life's dying after the 1st of August in the last year of the term. In every other event it would be a great advantage to the remainder-man. Several cases have been cited; amongst the rest *Doe v. Giffard*, which was first introduced by the counsel in argument in *Doe v. Wilson*. That case, however, is distinguishable, on the ground already stated by the Court; in that, no rent at all was reserved for the last half year. In *Doe v. Morse*, the rent was by the power required to be reserved payable *half-yearly*; instead of which it was made payable at unequal periods of five and

seven months. It is an express condition here that the lease is to contain a power of re-entry. Now, if the last half-year's rent were not payable until the last day of the term, the power of re-entry could not be exercised at all, and it might, in such a case, be argued that an express condition of the power had not been performed. If that would be a bad execution of the power, this is a good one. In *Regina v. Weston* (a), (where an order of justices for weekly payments by a putative father for the maintenance of a bastard child, to be made *every Monday*, was held good, although a week was not complete on the first Monday after the making of the order), *Powell, J.*, illustrated the case by supposing a similar one to the present:—"If a man had a power to make leases, reserving the ancient yearly rent annually, yet if it were reserved on a day before the year was up, as if the year ended at Christmas, and it were reserved at Michaelmas, it would be well, pursuant to the power;" which *Holt* agreed. [*Lord Abinger, C. B.*—It used to be a tradition in Westminster Hall, that when Lord Chief Justice *Holt* and Mr. Justice *Powell* agreed, you might trust the law of the case.]

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Secondly, as to the period of 42 days being allowed before re-entry: that is a power which ought to be exercised with a reasonable discretion. It is an open question what is a reasonable time. In *Doe d. Jersey v. Smith*, it was held that 28 days was not an unreasonable time. Whether a power of re-entry is within a reasonable time or not, it lies on the party who says that it is a bad execution of the power to shew that it is not.

Sir *W. Follett*, in reply.—The argument on the other side, if pushed to its full extent, would amount to this—that the tenant for life might reserve the rent on the first day of every year of the term: nay, the *literal words* "yearly rent," would be satisfied by a reservation of all

(a) Lord Raym. 1197.

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the rent in the last year. Is this such as the party, if he were tenant in fee-simple, would fairly make? The object of the power is to protect the parties, not to protect the estate. The tenant for life has power to bind the parties in remainder on certain terms, which are introduced for their protection. The principle is, that rent, being the compensation for the occupation of the land, shall be paid to the party who is the owner of the land when the occupation is complete; and a rent payable previously is an exception which cannot be brought within the power, unless by specific terms. There must be an equal distribution of the rent over the whole term. [*Parke, B.*—That cannot be, unless it be reserved from instant to instant; nor even then.] It is not put in that sense; but would a reservation *weekly* be good? [*Parke, B.*—It would come nearer the supposed rule you lay down, that every portion of time must be covered.] The judgment of *Bayley, J.*, in *Doe v. Morse*, is direct upon this point. [*Parke, B.*—It could not have been present to his mind how great is the inconvenience of rent becoming due when there is no power of taking it by distress.] This particular lease cannot be supported without maintaining the general doctrine, that rent may be reserved beforehand. There is not even any dictum in favour of such a reservation, except that quoted from Lord *Raymond*, where the point was not at all before the Court for their decision; and the case is referred to with a quære in *Sugden on Powers*, 620, 627 (4th edit.).

Cur. adv. vult.

The judgment of the Court was delivered on a subsequent day by

Lord ABINGER, C. B.—The question in this ejectment turned on the point whether there had been a due execution of a power contained in the will of a person under whom

the property was claimed. The question arose on the construction of the power itself. The estate was devised to several persons, with remainder over, and power is given to each of the persons being tenants for life to grant leases "for any term or number of years not exceeding twenty-one years in possession, and not in reversion, remainder, or expectancy, so as upon every such lease there be reserved and be made payable, during the continuance thereof respectively, the best improved yearly rent that can be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and so as none of the said lessee or lessees be made dispunishable of waste by any express words therein, and that in every such lease there be contained a clause of re-entry for non-payment of the rent or rents to be thereby respectively reserved ; and so as such lessee or lessees to whom such lease or leases shall be made seal and deliver counterparts of such lease or leases." There were two objections made to the lease executed in virtue of this power. It was first said, that although there was a clause for re-entry for non-payment of rent, yet the power of re-entry was limited to forty-two days after the rent had become due, which, it was urged, was an unreasonable time, and not in compliance with the power. Another objection was, that the best improved *yearly* rent was not properly reserved in this lease for twenty-one years, inasmuch as the last half-year's rent was made payable on a day in the month of August, whereas the year itself did not expire until Michaelmas.

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In answer to the first objection, cases have been cited to shew that a *reasonable* time may be allowed after the rent becomes due, without any contravention of the power. I am at a loss to see how this question could arise, unless there were an appearance of evasion of the requisitions of the power. One can conceive a case where, under the pretence of complying with a power in terms, the clause may be of

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such a nature as to make the proviso for re-entry in effect wholly nugatory. If such a case should arise, it would be a breach of the power: but here there is no appearance of evasion in the mode of framing the clause. The period of forty-two days is not an unusual one: every one knows that forty-two days is such a portion of time as it is usual for a tenant to be allowed to pay his rent after it becomes due. We therefore think the lease is not objectionable in respect to the clause of re-entry.

The second objection is, that the reservation of the rent for the last half year is in contravention of the power; but upon consideration we think there is no foundation for the argument urged on this point. The testator's reason for limiting the power by this proviso appears, upon the face of his own will, to be, that no premium or fine was to be taken from the lessee, and whatever was reserved was to be reserved as an annual rent, payable at the usual time, and not to be taken as a premium or fine, leaving nothing to the person in remainder who might succeed during the continuance of the term. There is no pretence for saying that there was in the present case any object to defeat the remainder-man's claim. On the contrary, the reservation of the last half-year's rent before the complete expiration of the year is a matter of prudence and caution, and is in general for the benefit of the lessor, whoever he may be. It can only be detrimental to the remainder-man on the supposition of the tenant for life dying after the day in which the last half year's rent is reserved, and before the expiration of the term—a supposition very highly improbable. We are of opinion that, in construing this power, looking at the words of the power, and to the intention of the testator, there is no ground for saying the power has been contravened in this respect. The manifest intention of the testator was, that the rent should be apportioned in twenty-one yearly payments; there is no direction further; it might be paid quarterly, half-yearly, or

yearly. There being therefore no direction on the subject, it would be quite sufficient to make it payable yearly within each of the twenty-one years. The spirit and intention then of the testator are complied with, as well as the words of the power; and we are of opinion that there is no valid objection to the lease on the second ground. On both grounds, therefore, the conclusion the Court come to is, that the judgment ought to be for the defendant.

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Judgment for the defendant.

ASHBY v. HARRIS, Esq.

DEBT against the sheriff of Northamptonshire for extortion. The declaration alleged that a writ of testatum fieri facias was sued out against the plaintiff, at the suit of H. B. Whitworth and R. Whitworth, directed to the sheriff of Northamptonshire, whereby he was commanded to levy of the goods and chattels of the defendant 54*l.* 9*s.* 2*d.* for damages recovered by H. B. Whitworth and R. Whitworth against the defendant; that the writ was indorsed to levy 22*l.* 17*s.* 6*d.*, besides sheriff's poundage, officers' fees, and all legal incidental expenses, and was delivered to the defendant as sheriff of Northamptonshire; by virtue of which said writ and indorsement the defendant, as such sheriff, seized and took in execution divers goods and chattels of the plaintiff of great value, to wit, of the value of the monies so indorsed on the said writ, and directed to be levied as aforesaid, and then levied the same: yet that the defendant, so being sheriff as aforesaid, by reason and under colour of his office, and under and by colour of the said writ of testatum fieri facias sued out against the plaintiff, wrongfully, illegally, and oppressively received and took from the plaintiff, for the serving and executing of the said writ, more and other consider-

Semble, that a declaration against a sheriff for extortion in the execution of a *fi. fa.*, must state the sum actually taken by him; and that it is not sufficient to allege that he took £— more than by the statute is allowed.

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ation and recompence than by the statute in such case made and provided in that behalf is allowed; that is to say, the sum of 1*l.* 16*s.* 2*d.* more than in that statute is limited and appointed, contrary to the form of the statute, &c.

Special demurrer, assigning the following causes:—That although it appears by the declaration that the writ was endorsed to levy 22*l.* 17*s.* 6*d.*, besides sheriff's poundage, officers' fees, and all legal incidental expenses, yet the plaintiff, in the allegation that the defendant seized and took in execution divers goods and chattels of the plaintiff of great value, to wit, of the value of the monies so indorsed on the writ and directed to be levied as aforesaid, and then levied the same, has not shewn with sufficient certainty whether he means that the defendant took in execution goods of the value of the said sum of 22*l.* 17*s.* 6*d.* only, or of that sum together with sheriff's poundage, officers' fees, and other legal incidental expenses; and also that the plaintiff has not by his declaration shewn with sufficient certainty, whether the defendant, by reason and under colour of his office, and under and by colour of the said writ, wrongfully, &c. received and took from the plaintiff, for the serving and executing of the said writ, more and other consideration and recompence than by the statute is allowed, in addition to and exclusive of the officers' fees and all legal incidental expenses; or whether he, the plaintiff, means to charge the sheriff with having taken and received more and greater recompence than is allowed by the statutes 29 Eliz. c. 4, or the 43 Geo. 3, c. 46, s. 5; and that the plaintiff has not stated or alleged *how much* the defendant received and took from the plaintiff for the serving and executing of the writ, but merely that he received and took 1*l.* 16*s.* 2*d.* more than by the statute is allowed; and the plaintiff, by such last-mentioned allegation, has so mixed up the law and fact, that the Court cannot see on the face of the declaration whether or not the de-

defendant has taken or received more than by law allowed; and the defendant cannot take issue on the allegation without leaving it to the jury to determine the law, and to say whether the defendant has taken more than by law allowed; whereas it is the province of the jury to say merely how much the defendant took by way of such consideration and recompence, and the province of the Court to say whether such sum is more than allowed by the statute; and the plaintiff ought therefore to have stated in the declaration how much the defendant took as such consideration and recompence. Joinder in demurrer.

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Peacock, in support of the demurrer.—The declaration is bad, for want of a statement of the actual amount taken by the defendant. [*Parke*, B.—The statute fixes the amount; the gross sum taken is merely a matter of calculation.] If the actual sum had been stated, that would have been traversable by the defendant, which the allegation as it stands is not: if issue were taken upon it, and if at *Nisi Prius* any doubt were to arise on the construction of the statute, that question of law would come to be determinable by the jury, instead of by the Court. [*Parke*, B.—We are supposed to know what the enactment of the statute is; then we know the defendant ought to have taken 12*d.* in the pound on the sum levied; that he took more than is allowed by law would necessarily follow.] Suppose a plea of the Statute of Limitations were framed thus, that the action did not accrue within the time limited by law,—surely that would be bad, as improperly mixing up fact and law. Had the plea been so framed in the case of *Paget v. Foley* (*a*), in which the question was whether an action for arrears of rent due under a lease was limited to six years by the 3 & 4 Will. 4, c. 27, s. 42,

(*a*) 2 Bing. N. C. 679; 3 Scott, 120.

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or to twenty years, by the 3 & 4 Will. 4, c. 42, s. 3, that important and difficult question must have gone to the jury, and the opinion of the Court could not have been taken cheaply upon it under the recent statute. In Com. Dig. Pleader, C. 17, it is laid down, that the certainty in a declaration ought to be such, that the Court may give judgment upon it, the defendant answer to it, and a good issue be joined thereon. In the present case, the Court cannot determine how much the defendant took, nor the jury whether he took more than is allowed by law. [*Parke, B.*—Is not this declaration in the form in which the precedents usually are?] It is undoubtedly according to the form given in *Chitty (a)*; but that will not give it authority, if it be contrary to principle. [*Alderson, B.*—Where do you find the principle that the jury cannot incidentally determine a question of law? it is every day's practice that they do.] But if it can be raised in pleading, it ought. A difficulty formerly existed on the words of this very statute, the 29 Eliz. c. 4, whether the sheriff ought to have 12*d.* in the pound on the first 100*l.*, and 6*d.* in the pound for all the amount beyond the 100*l.*, or whether he ought to have but 6*d.* in the pound where the sum exceeds 100*l.* It was determined, in *Lyster v. Bromley (b)*, that he was entitled after the former rate. But suppose that were now a doubtful point; that question of law would by this plea be mixed up with the question of fact. Again, in *Rumsey v. Tuffnell (c)*, the question arose, what the plaintiff is entitled to levy under the 43 Geo. 3, c. 46, s. 5,—whether the words “expenses of execution” in that act include the expenses of levying. That question may be intended to be raised in this case: and the allegation might and ought to have been in such terms as to enable the defendant to raise it.

(a) 2 Chit. Pl. 325 (6th ed.).

(b) Cro. Car. 286.

(c) 2 Bing. 255; 9 Moore, 425.

Humfrey was about to argue in support of the declaration, when

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PARKE, B. said—I think you had better amend: there is considerable weight in what Mr. *Peacock* has urged.

Leave to amend.

FILBEY v. COMBE and Others.

CASE to recover the value of certain dust, cinders, ashes, and rubbish, removed by the defendants from certain premises in the parish of St. Martin-in-the-Fields, between the 25th of March and 30th of June, 1836. Pleas, first, not guilty; secondly, that the said dust, &c. were not the property of the plaintiff; thirdly, that the defendants burnt and consumed certain coals in their brewery, in the parish of St. Martin-in-the-Fields, and thereby the dust, cinders, ashes, and rubbish mentioned in the declaration were produced; and that, having occasion to boil water for washing casks for use on other premises in the parish of St. Giles-in-the-Fields, they removed the intermixture of coals, cinders, ashes, &c., and with the same boiled the water on the premises aforesaid in the parish of St. Giles, and left such cinders, ashes, &c., there for the use of the person lawfully entitled thereto; and that such was the alleged conversion complained of in the declaration; fourthly, a plea similar to the last, but omitting the statement that the cinders, ashes, &c. were burnt a second time on other premises than the brewery in the parish of St. Martin-in-the-Fields.

The plaintiff replied *de injuriâ* to the two last pleas; and issue having been joined thereon, the following case

Under the Metropolitan Paving Act, 57 Geo. 3, c. 29, ss. 59, 60, the scavenger of a particular district is entitled only to such dust, ashes, &c. as are, in the contemplation of the owner, rubbish or refuse, and as he desires to dispose of in that character.

Therefore, where brewers, occupying premises in parish A., burnt coals there in the process of brewing, and when they were partially consumed by having passed once through the fires, removed them, intermixed with the dust and ashes arising from the same fires, to other premises occupied by them in parish B., the scavenger of

where they used them for heating water to cleanse their casks:—*Held*, that parish A. was not entitled to claim any of the articles so removed.

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By the act 57 Geo. 3, c. 29, intituled "An Act for the better paving, improving, and regulating the streets of the metropolis, and preventing and removing nuisances and obstructions thereto," it is in the 59th section enacted, "that it shall be lawful for the commissioners, trustees, or any other persons having the control of pavements in the the streets or public places in any parochial or other district within the jurisdiction of the act, who, by any local act or acts of Parliament relating thereto, are also authorized and empowered to direct the cleansing of the streets or public places within such parochial or other district, at any time or times thereafter to agree, by private contract or public auction, or by tender or proposal, for any time not exceeding three years, with any person or persons to be the scavenger or scavengers, raker or rakers, cleanser or cleansers of the streets and public places within the said district; and such person or persons, on a certain day in every week, and oftener when required by any three or more of the said commissioners, &c., shall bring or cause to be brought convenient carriages into all such streets and public places where such carriages can be drawn near or pass into, and at or before their approach, by bell, horn, clapper, or otherwise by a loud noise or cry, shall give notice to the inhabitants, &c.; and such scavengers, &c. shall take and carry away from the respective houses and premises of the inhabitants or occupiers their soil, ashes, cinders, rubbish, dust, dirt, and filth, all which the said scavengers, &c. shall take and carry away at their own costs and charges, upon pain of forfeiting a sum of 40*s.* for every default, except &c., (being an exception as to rubbish arising from building or alterations in houses, &c.); and also that if any person or persons shall refuse to permit such soil, &c. to be taken away by the scavengers, &c., or other persons appointed by and agreeing

with the commissioners, &c. as aforesaid, every such person so offending shall forfeit the sum of 5*l*. Then follows a power to the commissioners or trustees to appoint different persons to collect and possess the said ashes, dirt, cinders, &c., as they shall deem expedient; but that the right and benefit of such soil, ashes, &c. shall belong exclusively to the person or persons who shall be from time to time by the said commissioners or trustees, or other persons as aforesaid, appointed to collect and possess the same, anything in any local act of Parliament, or in that act, to the contrary notwithstanding. And by the 60th section it is enacted, that if any person or persons other than the scavengers, &c. of any parochial or other district, or the other person or persons employed or appointed by or contracting with the said commissioners, &c. to collect and retain the dust, &c. within their respective districts, or those employed by and under such person or persons, shall on any pretence whatsoever go about to collect or gather, or shall ask for, receive, or carry away any dust, &c. [the clause goes on to provide for the forfeiture by such person, on conviction before a justice, of 10*l*. for the first offence, 15*l*. for the second, and 20*l*. for every subsequent offence, to be applied as in the act directed.]

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The plaintiff in this action is the contractor for cleansing the streets and public places in the parish of St. Martin-in-the-fields, Middlesex, with the commissioners having the control of the pavements within the same parish, for the term of one year from the 25th of March, 1836. The defendants carry on business as brewers in extensive premises in Castle-street, Long Acre, within the same parish, and in the brewing of beer they burn very considerable quantities of coals; and those premises not being sufficiently extensive for all the purposes of their trade, the defendants have also for upwards of twenty years past occupied a considerable piece of ground called Mason's Yard, situate in Broad-street, in the parish of St. Giles's-

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in-the-Fields, and which they necessarily and duly use as a cooperage for cleansing and preparing barrels and casks for the reception of the beer brewed by them in the said premises in Castle-street. In the process of brewing, strong fires are required to be kept constantly burning under the coppers, for which purpose great quantities of small coal are frequently thrown into the furnaces there by shovels, and the fires at the same time are raked and stirred to keep up the proper degree of heat, by which means a quantity of the small coal passes into the ash-hole unconsumed, or only partially consumed, and becomes intermixed with the dust, cinders, and ashes arising from the same fires. In such state such unconsumed or only partially consumed coal does not retain sufficient strength for the purpose of brewing, but is sufficiently strong for the purpose of heating water for cleansing and scalding casks and barrels; and the premises in Castle-street not being sufficient, either in extent or construction, for the brewery and cooperage also, the defendants have for upwards of twenty years past carried away, and did between the 25th day of March and 30th day of June, 1836, carry away the dust, &c. from the brewery, so mixed with partially consumed coal as aforesaid, to their said other premises in the parish of St. Giles, and there used the same for the purpose of heating water to cleanse and scald their casks and barrels used at the brewery as aforesaid, and after using the same for that purpose, the dust, cinders, and ashes from thence arising were from time to time suffered and permitted by the defendants to be taken and carried away by the scavenger of the parish of St. Giles from the said cooperage premises in which they then were.

The plaintiff, soon after entering upon his contract, applied at the said brewery of the defendants for the dust, cinders, and ashes made therein; but the defendants, insisting on their right to remove the same, together with the partially consumed coal intermixed therewith, for the

purposes of their trade, refused to deliver them up to him, and continued to carry them away as they had theretofore done to their other premises in the parish of St. Giles, and so there used the same.

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The value of the dust, cinders, and ashes removed by the defendants for the purpose aforesaid has been agreed upon between the parties at 45*l.*, for which sum a verdict is to be entered for the plaintiff, if the Court should be of opinion that, under the circumstances herein stated, the defendants were not entitled to carry away and use the said dust, cinders, ashes, and partially consumed coals so intermixed as aforesaid; and if otherwise, then a nonsuit is to be entered.

Godson, for the plaintiff.—By the provisions of this act of Parliament, a contract, which is executed by the commissioners, arises between each inhabitant of the several parishes or districts, and the scavenger of the district, that if he will cleanse the streets and clear the fronts of the houses from dirt, as soon as the coal consumed by them becomes dust and cinders, and is about to be removed from the premises on which it was produced, having ceased to be of any use for consumption there, it shall belong to the scavenger. The parties pay by the dust and ashes for the removal of the dirt from before their houses. [*Parke*, B.—Is anything *dust* or *ashes* within the meaning of the act but that which the parties themselves choose to treat as refuse? If it is in such a condition that the party chooses to part with it himself, then the plaintiff has a monopoly of removing it.] If the defendants can remove it from their brewery to their cooperage in a different parish, so might they also to their garden or field in the country: the consequence might be that no dust could be taken by the contractor. If that be so, it will vary the contracts of all the metropolitan parishes with the scavengers. By sect. 59, a *duty* is imposed on the scavenger of

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removing the dust, &c.; and by s. 60, no other person can remove it. The occupier himself, therefore, cannot part with it for the purpose of *sale*. If the defendants can remove it as they contend, wherever the party occupies two places in different parishes, he may deprive the scavenger of the parish in which it was produced of it altogether. *Ward v. Bird* (a), decided that the scavenger can enforce his right under such a statute as the present, by an action on the case. [*Parke, B.*—At what time does the property of the scavenger in the ashes begin?] When the owner has done with them as to that place. [*Parke, B.*—Is it not when they become refuse as to him—when he has done with them altogether? Lord *Abinger, C. B.*—Suppose the confines of the parish to be so near, that removing them from one part of the premises to another would take them out of the parish—may not the party do that?] It is submitted that each inhabitant undertakes, that when he has reduced the cinders and ashes to such a state that, in the ordinary carrying on of his trade, or of his domestic economy, he would wish them removed *thence*, they shall belong exclusively to the scavenger of the district, who has performed his part of the contract by cleansing the streets. Can the owner remove them to his field for manure?—yet they would probably be more valuable to him for that purpose than any other. At all events, supposing the partially consumed coal does not belong to the scavenger, that ought not to carry with it the *dust*. [*Bolland, B.*—Then you impose upon the owner the necessity and expence of sifting it for you.]

Sir *W. Follett*, contra.—The question is not now whether the dust, &c. can be used for manure; but whether that which is usable *as fuel* is the scavenger's or not. The plaintiff must say it is his, when it has once been in the fire.

(a) 2 Chit. Rep. 592.

The meaning and object of the act is clearly this—that when, after the parties have fully consumed their coal, &c., there is any accumulation of dust or ashes, that shall be removed by and become the perquisite of the scavenger. [He was then stopped by the Court.]

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PARKE, B. (a)—The question is, what is the meaning of the enactment in the 59th section of this act of Parliament? I think it is clear, if you look at the whole context, that it applies to such things as are in the contemplation of the owner *rubbish*, and which he desires to dispose of in that character. If there be any other purpose to which the dust, &c. can be applied, except treating it merely as rubbish, he has a right to do so, either where it was produced, or on any other premises. If it be combustible as fuel, he has a right so to use it on any premises he may have. The right of the scavenger only attaches when the owner has no use for the articles mentioned in the act except as rubbish. Perhaps he may not be entitled to sell or dispose of them in the character of rubbish; but it is not necessary now to decide that.

BOLLAND, B., and ALDERSON, B., concurred.

Judgment for the defendants.

(a) Lord Abinger, C. B., had left the Court.

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Sir JOHN SMITH, Knight, *v.* THOMAS STARLING DAY and
HENRY FRAMLINGHAM DAY, Executors of Sir HAYLETT
FRAMLINGHAM, deceased.

An executor, after payment of all the debts of which he had notice, invested certain parts of the residue of the testator's personal estate remaining in his hands, in the funds in his own name, received the dividends, and paid them over to the legatees in satisfaction of their legacies given by the will:—*Held*, that under these circumstances, the executor could not sustain a plea of plene administravit to an action brought against him, 15 years after the testator's death, for a specialty debt of the testator, of which he had had no notice.

Where A., being seised in fee, leased premises to B. for 61 years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the 61 years:—*Held*, that, by the lease to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease.

DEBT on a bond of indemnity, dated the 24th May, 1819, given by the testator to the plaintiff, subject to a certain condition, whereby, after reciting an indenture of lease of the 28th February, 1786, between Sir Thomas Spence Wilson, since deceased, and Dame Jane, his wife, of the one part, and Samuel Noble of the other part, of certain premises, for forty years from Christmas, 1785; and further reciting another indenture of lease of the 10th December, 1809, between the said Dame Jane and Sir T. Maryon Wilson, her son, of the one part, and Martha Noble of the other part, of certain other premises, from September, 1808, for 61 years; and further reciting a sub-lease of the 20th May, 1816, by the Nobles to Sir H. Framlingham, with the consent of Dame Jane Wilson, of parts of the premises respectively demised to them by the leases of 1786 and 1809; and further reciting another indenture of lease of the 30th August, 1816, and made between the said Dame Jane Wilson and the said Sir T. M. Wilson of the one part, and the said Sir H. Framlingham of the other part, by which indenture, for the considerations therein mentioned, they the said Dame Jane Wilson and Sir T. M. Wilson demised and leased unto Sir H. Framlingham, his executors, administrators, and assigns, the same portion of the premises as is comprised in the sub-lease of the 20th of May, 1816, and which is part of the same land as is comprised in the leases respectively of the 28th of February, 1786, and the 10th of December, 1809, to hold the pieces of land demised by the lease of 28th February, 1786, from the 25th day of December, 1825, when the term of forty years thereby created would determine, for

the full term of forty-three years and three quarters then next following, and to hold the lands comprised in the lease of the 10th of December, 1809, from the 29th day of September, 1869, when the said term of sixty-one years thereby created would expire, for and during the full term of seventeen years thence next ensuing, subject, during the said term of forty-three years and three quarters, to a yearly rent of 34*l.*, payable to the said Dame Jane Wilson and her assigns during her life, and after her decease to the said Sir T. M. Wilson during the residue of the said term; and also subject, during the said term of seventeen years, to the yearly rent of 52*l.*, payable to the said Sir T. M. Wilson, his heirs and assigns, and to the performance of the covenant therein contained for payment of the yearly rent of 6*l.*, as the consideration for the grant of the remaining terms thereby granted, and all other covenants and agreements therein reserved and contained: And further reciting, that by indenture of assignment bearing even date with the said bond of indemnity, and made between the said Sir H. Framlingham of the first part, and the said plaintiff of the second part, the said messuages, tenements, erections, buildings, and other premises, comprised in and demised by the said indentures of lease of the 20th of May, 1816, and the 30th day of August, 1816, were assigned to and were then vested in the said plaintiff for all the residue of the said term of years granted by the said indenture of lease, subject to the rents, covenants, and agreements, on the tenants', lessees', or assignees' part to be paid, observed, and performed for or in respect of the same premises: And reciting, that upon treaty for the sale of the said leasehold premises to the said plaintiff, it was and is among other things agreed, that the said Sir H. Framlingham should enter into a certain written obligation, to be conditioned as hereinafter is expressed: the condition of the said written obligation is declared to be such, that if the said Sir H. Framlingham, his executors,

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administrators, and assigns, should from time to time and at all times thereafter well and sufficiently save, defend, protect, and keep harmless and indemnified the said plaintiff, his executors, administrators, and assigns, and his and their estate and effects whatsoever and wheresoever, and particularly the said hereditaments so assigned as aforesaid, or intended so to be, by the said indenture of assignment of even date therewith, with their appurtenances, from and against the payment of the rents respectively reserved in and by the said indentures of lease of the 28th of February, 1786, and the 10th of December, 1809, and all actions, suits, costs, charges, damages, losses, and expenses whatsoever which he or they might sustain or incur for or by reason or on account of the same rents, or either of them, or any non-payment of the same or any part or parts thereof respectively, or otherwise in relation thereto, then the said written obligation should be void, otherwise should be and remain in full force and virtue; as by the said writing obligatory fully appears. The declaration then shewed that the estate and interest of the grantors of and in all the above demised premises descended and came to Sir Thomas Maryon Wilson, who was seised thereof in fee; and the obligors of the bond having allowed rent in respect of the premises demised by the indenture of the 10th day of December, 1809, to fall into arrear, Sir Thomas Maryon Wilson entered and distrained for the same, and the plaintiff was obliged to pay it, and that thereby an action accrued to him against the defendants upon the said bond.

Pleas: first, That the defendants had fully administered before the commencement of the suit; secondly, That after making the said bond Sir H. Framlingham died, in the year 1820; and that the defendants had no notice of the bond till August, 1835; that they had fully administered before notice, and had no goods or chattels to administer since notice.

The replication traversed these pleas, upon which issues were joined. *Exch. of Pleas,*
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The cause was tried before Lord *Abinger*, C. B., at the Middlesex sittings after Michaelmas Term, 1836, when a verdict was entered for the plaintiff for 625*l.* 5*s.* damages, assessed on the breach assigned, subject to the opinion of this Court upon the following case, with liberty for either party to turn the same into a special verdict:—

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The declaration was proved in point of fact.

The defendants contend that it is insufficient in point of law. If the Court should be of that opinion, the judgment is to be arrested, and the subsequent question does not arise; but if the Court should be of opinion that the declaration is sufficient, the defendants rely upon the following facts, as supporting one or other of their pleas.

Sir Haylett Framlingham, in the pleadings mentioned, died on the 10th day of May, 1820. He left a will properly executed and attested by two witnesses, dated the 2nd of June, 1815, which was proved in the Prerogative Court of Canterbury on the 17th of July, 1820, by the defendants Thomas Starling Day and Henry Framlingham Day, the executors thereof; of which the following is a copy:—

“This is the last will and testament of me, Sir Haylett Framlingham, Knight Commander of the Honourable Order of the Bath, and Colonel of the Royal Horse Artillery, made, published, and declared this 2nd day of June, in the year of our Lord 1815. First, I nominate and appoint my nephew Thomas Starling Day, and Henry F. Day, executors of this my will; and I do hereby authorize and direct my executors, as soon as conveniently may be after my decease, to convert all the personal estate and effects of which I shall die possessed into ready money, and after payment thereof of my just debts and

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funeral and testamentary charges, to lay out and invest the residue thereof in their names in the public stocks or funds of this kingdom; and the dividends or interest thereof I give and bequeath unto my sisters Frances and Ann Framlingham, to be paid to them in equal moieties during their joint lives; and after the decease of either of my said sisters, I give the whole of such dividends or interest unto the survivor for and during her life; and after the decease of such survivor, then I give and bequeath the principal money which shall be so laid out and invested in the said stocks or funds unto all or any one or more of the children or grandchildren of my sister Margaret Day, in such parts, shares, and proportions, upon such trusts, and to be payable at such times as she, the said Margaret Day, shall by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, or any codicil or codicils thereto, to be signed and published by her in the presence of two or more credible witnesses, direct, limit, or appoint; but if it shall happen that my said sister Margaret Day shall not make any such direction, limitation, or appointment, then I give and bequeath the said principal sum of money unto all the children of my said sister Margaret Day who shall be living at her decease, and the issue of such of her children as shall then happen to be dead, equally to be divided amongst them share and share alike; but it is my will that the issue of any deceased child or children shall be only entitled to the share or shares which the parent or parents of such issue would have received if he, she, or they had been living at the time of the decease of my said sister Margaret Day; and lastly, I give and bequeath unto my nephew James Day, a Lieutenant in the Royal Artillery, all the badges or marks of merit or distinction which I now possess or may hereafter be honoured with. In witness," &c.

The testator died possessed of personal property to the

amount of 1,676*l.* 2*s.* 2*d.*; and the said T. S. Day and Henry F. Day received assets to that amount, including the produce of 997*l.* 10*s.* New 4 per cent. Annuities, formerly 950*l.* Navy 5 per cents., hereafter mentioned; they paid the debts and funeral and testamentary expenses of the testator, Sir H. Framlingham, to the amount of 525*l.* 4*s.* 5*d.*

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On the 30th November, 1820, the said T. S. Day and H. F. Day laid out the sum of 158*l.* 15*s.* in the purchase of 150*l.* Navy 5 per cents. in their names, in pursuance of the will of Sir H. Framlingham, for the benefit of Frances and Ann Framlingham, the legatees for life. On the 17th October, 1821, the said T. S. Day and H. F. Day passed the accounts of the estate and effects of the testator Sir H. Framlingham at the Legacy Office, Somerset House, and paid the sum of 29*l.* 8*s.* 11*d.* for the legacy duty thereon, at the rate of 3*l.* per cent., payable by the legatees under the will.

In the month of March, 1824, the said T. S. Day and H. F. Day, with the privity and consent of the parties interested, sold out the sum of 997*l.* 10*s.* New 4 per cent. Annuities, formerly 950*l.* Navy 5 per cent. Annuities, then standing in the name of the said Sir Haylett Framlingham, which produced the sum of 1061*l.* 5*s.* 2*d.*

The said T. S. Day and H. F. Day, in March, 1824, lent on mortgage in their names, at 5 per cent., to Mr. Wm. Pearson, of Sprole, Norfolk, the sum of 1,000*l.*, part of the produce arising from the sale of the 997*l.* 10*s.* New 4 per cents.

On the 10th of June, 1826, the said T. S. Day and H. F. Day received back the sum of 1,000*l.* of the said Wm. Pearson, in discharge of his said mortgage.

On the 22nd of August, 1826, the said T. S. Day and H. F. Day laid out the sum of 1,028*l.* 7*s.* 9*d.*, including the said sum of 1,000*l.*, with the consent in writing of Frances Framlingham, Anne Framlingham, and Margaret

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Day, the legatees for life, and themselves the said T. S. Day and H. F. Day, James Day, George Day, E. Day, Wm. Day, Wm. Foster, Lucas Worship, and S. Day, the legatees entitled to the reversion under the said will of the said Sir H. Framlingham, in the purchase of 53*l.* Bank Long Annuities, in the names of the said T. S. Day and H. F. Day, under the trusts of the will, for the benefit of the said Frances and Anne Framlingham, the legatees for life, who are now respectively living. The value of the said Long Annuities exceeds the damages assessed as aforesaid.

The said T. S. Day and H. F. Day, from the year 1821 to the commencement of this action, received all the dividends and interest from time to time as they became due and payable on the said sum of 950*l.* Navy 5 per cents., afterwards 997*l.* 10*s.* New 4 per cents., until the sale thereof as aforesaid; and also on the said sum of 1,000*l.* lent on mortgage to the said William Pearson as aforesaid, until the same was paid off; and afterwards on the said sum of 53*l.* Bank Long Annuities, and also on the said sum of 150*l.* Navy 5 per cent. Annuities, afterwards 157*l.* 10*s.* New 4 per cent. Annuities, and now 157*l.* 10*s.*, 3½ per cent. Annuities; and paid the same respectively from time to time to Frances and Anne Framlingham, the legatees for life under the will of the said Sir H. Framlingham, for their use and benefit.

There are now standing in the Bank of England, in the names of the said T. S. Day and H. F. Day, the said sum of 53*l.* per cent. Long Annuities, and 157*l.* 10*s.* 3½ per cent. Annuities.

The defendants first had notice of the bond mentioned in the declaration on the 1st day of August, 1835.

The question for the opinion of the Court is, whether the preceding facts establish either of the defendants' pleas. If they do, the verdict for the plaintiff is to be set aside, and a verdict entered for the defendants upon both

or either of the issues arising out of these pleas, as the Court may direct; if they do not, the verdict is to stand for the said sum of 625*l.* 5*s.*, or so much thereof as the Court shall direct.

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Kelly, for the plaintiff.—The first question is, whether the facts stated in the case establish either of the defendants' pleas: and it is submitted that they do not. It will be contended for the defendants, that they are in the situation of having *paid* these legacies out of the assets, and that that is an answer to an action for a breach of this bond subsequent to the death of the testator. But the investments made by the defendants in their own names in the years 1820, 1824, and 1826, although made for the benefit of the legatees, were not *payments*, but the stock is still assets in their hands; and it appears that all the interest and dividends have been paid to the defendants from the death of the testator to the present time. Assuming, however, that these legacies were *paid* without notice of the bond, that payment would be no answer to the action. Payment of legacies is no answer to an action on a bond of the testator, even when the breach has been committed after such payment. It is true that, in *The Governor and Company of the Chelsea Waterworks v. Couper* (a), Lord *Kenyon* expressed an opinion, that "when an executor or administrator has satisfied the debts and legacies affecting the testator's or intestate's estate, and paid over the remainder to the residuary legatee, and has had no notice of any other subsisting demand, providing he has not done it too precipitately," it was a good answer to an action such as the present; but that case has never been cited or acted upon as a valid authority, but, if not overruled, has been very much doubted, both in courts of law and equity. There, also,

(a) 1 Esp. 277.

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twenty-two years had elapsed since the executor had paid over the assets to the legatee, without any notice to the executor of any outstanding claim. The payment of simple-contract *debts* may be an answer to the nonpayment of debts of a higher nature, without notice; but the payment of legacies is not so, and the executor can compel the legatees to refund: *Hawkins v. Day* (a). The repayment of simple-contract debts was held a good answer to such a claim, but payment of legacies not. An executor, by applying to a court of equity, may obtain an indemnity before he will be compelled to pay the legacies: *Simmons v. Boland* (b). It is assumed in that case that for any future breach the executor would be liable at law. [*Alderson, B.*—There the executor had notice of the covenant, though not of the breach. Have you any case in which, when the legatees have filed a bill to compel payment of the legacies, the Court has ordered an indemnity, when there has been no notice of any outstanding claim?] That would depend upon whether it was *suggested* that there was any outstanding claim. Where legatees file a bill for the payment of legacies, and the executors set up some outstanding claim against the estate, of which they have had notice, they will not be compelled to pay the legacies without an indemnity; but where the executors have had no notice, and a claim arises after the legacies have been paid, the legatees will be compelled to refund. In *Davis v. Blackwell* (c), *Tindal, C. J.*, says, "I am not prepared to say that payment of legacies would in any case afford an answer in a court of law to an action brought against the executor for a debt due from the testator; for I find the rule universally laid down, that, *after* payment of the debts of the testator or intestate, it is the duty of the executor or administrator to pay the legacies." The judg-

(a) Ambler, 162.

(b) 3 Merivale, 547.

(c) 2 Moore & Scott, 7; 9 Bing. 8.

ment of Lord *Eldon*, in the case of *Vernon v. Lord Egmont* (a), proceeds on the principle that an executor may always call for an indemnity, which pre-supposes a liability. The case of *Norman v. Baldry* (b) was very similar to the present, with the exception that in that case there was an actual debt, whereas this was a contingency. There nine years had elapsed without any notice to the executors of the existence of the bond; and the debt was not contingent in its nature, but had existed during the whole of eleven years, during which time the creditor might have given notice. Here notice was given immediately on the breach. In *Pearson v. Archdeaken* (c), which was a case at law, it was held that the payment of legacies was no answer to the claims of a creditor. That was an action of covenant brought against the executor of A. B. deceased, on a lease made by the assignor of the plaintiff to the deceased, where the breaches in respect of which the plaintiff claimed took place many years after the testator's death; and the defendant pleaded plene administravit, upon which issue was joined; and it was held that evidence of the payment of legacies would not support that plea. With the single exception of the case of the *Governor and Company of the Chelsea Water Works v. Cowper*, all the decisions are in favour of the proposition, that, either at law or in equity, payment of legacies is no answer to a demand of this nature. But it is not necessary here to carry the argument to that extent, because all the money invested in the funds is now in the actual possession of the executors. They have, it is true, paid the dividends to the legatees, but they still hold the principal in their own names and under their own charge. It may be admitted that, if this were a question in a court of equity as between the legatees and executors, on a bill filed by the legatees for payment of

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(a) 1 Bligh, New Series, 571.

(b) 6 Sim. 621.

(c) 1 Alcock & Napier (Irish Reports), 23.

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the legacies, the executors might not be allowed to say in answer that they held not as executors but as trustees, because there would be evidence of assent; but, as against the plaintiff, the executors have never dispossessed themselves of the effects of the testator. In this case, moreover, some of the legacies have been paid within the six months. As to them at least, these pleas can be no answer. The 8th section of the statute 22 & 23 Car. 2, c. 10, though relating expressly only to administrators, would seem to be equally applicable to executors: *Davis v. Blackwell* (a). The plaintiff has sued as soon as the breach was committed, and there is no authority to shew that it was his duty to give notice of this liability.

Secondly, as to the other point, which arises on the face of the declaration. It will be contended that the defendants are not bound to indemnify the plaintiff, because the distress was not lawful, the lessor having parted with his reversion, so as to take away his right to distrain. But Sir T. M. Wilson did not part with any right as landlord, by extending the term of the lease of the 10th December, 1809, by that of the 30th August, 1816. It amounted merely to a deferring of the reversion, not to a granting of it away. The class of cases, of which *Thorn v. Woolcombe* (b) is the last, are distinguishable. That and the other cases tend to shew that when a lessee demises by way of under-lease for the whole residue of the term, it operates as an assignment of his reversion. That is not disputed; but it does not apply here, because this was a demise by a person seised in fee. [*Parke, B.*—The second lease to commence *in futuro* was a mere *interesse termini*. The reversion continued in the lessor till the determination of the first term.]

Sir *W. Follett*, for the defendants.—The question is, whether an executor or administrator, who pays legacies

(a) 9 Bingham, 5.

(b) 3 B. & Adol. 586.

in the due course of administration, can be afterwards made liable for specialty debts, even though he has had no notice of them. It is said that previous payment of simple contract debts would be a good answer to an action on a bond, where the executor has had no prior notice of it; but that the same principle does not apply to the payment of legacies. Many of the cases which have been cited turned upon the length of time which had elapsed before any claim made. Now, in this case, the testator died in 1820: the plaintiff was then the holder of this bond, of which he gave no notice till 1835, and then he brings this action. In the interval the executors had administered the debts and legacies. Then the question is, whether, after a lapse of fifteen years, without notice of any outstanding claim whatever, these payments are to be protected or not. In the old authorities, a distinction will be found to have been taken between cases where the legacies have been paid prior to the actual breach of the bond, and where they have been paid prior to notice. The earliest case is *Nector v. Gennet* (a), referred to by Sir W. Grant in *Simmons v. Bolland*. In that case, the Court of Queen's Bench appear to have been of opinion that the payment of a legacy before a bond, which was not forfeited, was good. Lord Coke said: "The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty maintainant which is in the condition; but otherwise it is where a statute or obligation is for the performance of covenants, or to do a collateral thing; then, until it be forfeited, it is not any plea against a legatee; for peradventure it shall never be forfeited, and may lie *in perpetuum*, and so no will should be performed." There is no authority for saying that an executor who has administered the assets and paid the legacies prior to any

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(a) Cro. Eliz. 466; 2 Williams on Executors, 831.

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notice of the existence of a specialty of this nature, is liable in consequence of so doing: if it were so, no executor would administer. [*Alderson*, B.—It must follow, that in all cases there must be an indemnity where it is asked for. *Parke*, B.—The executor may always indemnify himself by an action for contribution. *Alderson*, B.—There is this distinction between paying a simple contract debt and a legacy,—that he may be compelled by law to pay a simple contract debt, but not a legacy.] By filing a bill, the legatee may equally compel him to pay the legacy. *Hawkins v. Day* (a) is no authority that where there is a payment of legacies before notice, the executor would not be protected. All that Lord Hardwicke must be taken to have determined is, that payment of simple contract debts before a notice of specialty of this nature, *would* be protected. In *Wms. on Executors*, p. 960, he is stated to have held that, although payment by an executor of a simple contract debt before any breach of the condition of a specialty, ought to be allowed as a good administration against the specialty, yet that payment of the legacy, *after notice of the specialty*, and before a breach, was not a good payment. The cases in equity all proceed on the assumption that the executor had notice. In *Simmons v. Bolland* (b), Sir W. Grant treats it as a question of very doubtful law. After going through the authorities, citing *Eeles v. Lambert* (c), *Nector v. Gennet*, and *Hawkins v. Day*, his Honour thus concludes: “In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him, in case of judgment being recovered against him at law for any future breach of the covenant.” Suppose, in 1824, a bill had been filed by these legatees, and the Court had thought that a sufficient time had elapsed; would they not have

(a) Ambler, 160.

(b) 3 Merivale, 552.

(c) Styles, 37, 54, 73; Aleyn, 38.

ordered the funds to be transferred without any indemnity, the executors having no notice of this bond? According to the argument on the other side, such an order of the Court would have been no protection to the executors if an action had been afterwards brought against them. Suppose a legacy of 5000*l.* left to a pauper; he could not obtain payment of it, because he could give no sufficient indemnity, which must be to the amount of the money paid over. In *Lord Egmont v. Vernon* (a), Lord Gifford decided that the executor incurred no liability by paying over the residue without an indemnity, although, under the special circumstances of that case, the House of Lords reversed his decree, and directed an indemnity. The judgment of Lord Eldon in *Gillespie v. Alexander* (b), as to payment of legacies, is important. "Although the language of the decree, where an account of debts is directed, is, that those who do not come in shall be excluded from the benefit of that decree; yet the course is to admit a creditor, he paying the costs of the proceedings, to prove his debt, as long as there happens to be a residuary fund in Court or in the hands of the executor, and to pay him out of that residue. If a creditor does not come in till after the executor has paid away the residue, he is not without remedy, though he is debarred the benefit of that decree. If he has a mind to sue the legatees, and bring back the fund, he may do so; but he cannot affect the legatees, except by suit; and he cannot affect the executor at all." It may be said, that if an executor compels parties to file a bill, he will be protected, but if he does not, he will remain liable; but it is apprehended the Court would not lay down such a rule. The opinion of the Vice Chancellor, in *Norman v. Baldry* (c), is undoubtedly opposed to that of Lord Kenyon, in the *Chelsea Waterworks Company v. Cowper* (d), but the latter opinion is to be preferred.

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(a) See 1 Bligh, N. S. 558.

(c) 6 Sim. 621.

(b) 3 Russell, 136.

(d) 1 Esp. 275.

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Brooking v. Jennings (a) and *Harman v. Harman* (b) shew that a party who distributes the assets out of the ordinary course, as by payment of a simple contract debt before a specialty, without notice, is protected. In *Davis v. Blackwell* (a) it does not appear that the executor had not received notice of the existence of the covenant, though he had none of the breach, when he paid over the assets to the residuary legatee. There is no valid distinction between simple contract debts which are paid out of their ordinary course before specialties without notice, and the payment of legacies without notice. This case is distinguishable also from *Pearson v. Archdeaken*, because there the executor had had notice of the existence of the covenant. It is submitted, that an executor *bonâ fide* administering according to his knowledge, and within a reasonable time of the probate, is not liable to pay debts of which he has no notice. Then, as to the argument which is raised upon the investments in the funds, and of the sum of 1,000*l.* on mortgage. The interest and dividends have been regularly paid to the legatees for life, and the defendants are not now possessed as executors, but merely as trustees. In *Williams on Executors*, vol. 2, pp. 860, 861, the authorities are collected, and *Byrchall v. Bradford* (d) is cited, where it was held, that "where an executor, who happens also to be named a trustee of a legacy to be laid out in stock, has fully administered the estate and assented to the legacy, and retains the legacy in his hands, not as assets of the testator, but as trustee of the legacy, then the principle which would apply to another trustee must apply to him; he is no longer clothed with the character of executor, but is, as to the legacy, a mere trustee." If the defendants were now to apply these funds in payment of this demand, a court of equity would compel them to replace them.

(a) 1 Mod. 174.

(b) 3 Mod. 115; 2 Show. 492.

(c) 9 Bing. 8; 3 M. & Scott, 7.

(d) 6 Madd. 13.

Secondly—The judgment ought to be arrested, because the distress was illegal, Sir T. M. Wilson not being the reversioner expectant on the determination of the lease of 1809, and therefore having no right to distrain. By the lease of 1816, he granted that reversion to Sir H. Framlingham. In Bacon's Abr., Leases, N., it is said, "If one, having made a lease for life or years to A. of lands, does after make another lease for years to B. of the same lands, or the reversion of those lands, *habend'* the said lands, or the reversion of those lands, to the said B. *cum post sive per mortem, resignationem, sursum redditionem, vel aliquo alio modo vacare contigerit*; in this case B. hath election to take such lease either as a reversion or reversionary interest, if he can prevail for an attornment of A., the tenant in possession; or if not, yet, as a future *interesse termini*, such lease will be good, to take effect in possession upon the determination of the first lease." The effect of which is, that if the lessee will attorn to the second lessee it will vest the reversion in him, but if not, then he has an *interesse termini*. [Parke, B.—That is the case of a lease in possession. Here it was intended that the second lease should not have effect until the expiration of the first. It is a mere *interesse termini*. The lessee is to have no interest whatever till the determination of the first lease. Then how is that to pass the reversion?] It is submitted, that if a party makes a lease for twenty-one years, and a second lease to commence on the determination of the first, the effect of that, with attornment, would be to grant away the immediate reversion expectant on the determination of the first lease. [Parke, B.—The second lessee has no interest whatever till the determination of the first lease, except a mere *interesse termini*. It is clear that no reversion could pass by that deed, since it is a mere interest in futuro.]

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Kelly, in reply, was directed to confine his observations to the first point.—It is agreed, that in all cases where the

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legatee files a bill for payment of a legacy, and the executor sets up an outstanding contingent liability as a defence, a court of equity will decree an indemnity; but in those cases there is an *acknowledgment* of notice. But those cases, as far as the Statute of Distributions is concerned, do not apply. The Statute of Distributions, 22 & 23 Car. 2, c. 10, s. 8, first of all provides for the payment of debts during the year, and after the expiration of one year an administrator may distribute shares of the residue. There is no distinction as to whether there is notice or not—the next of kin can only claim to be paid on giving a security to refund in case of after-discovered debts. It is not contended that the executor is liable *de bonis propriis*. It is by operation of law, by his false plea, that he is liable. Under the statute the operation of refunding is to take effect through the administrator: it provides that the parties to whom distribution has been made “shall refund and pay back to the administrator,” which clearly implies that the law contemplated that an administrator was liable to a suit for a debt after a decree. In either case there is a remedy for the executor or administrator. The assets of the testator are liable as long as a *bonâ fide* debt exists, whether paid over by the executor in payment of legacies or not. It may be admitted, that where an executor has paid under a decree, it is hard he should have afterwards to settle a creditor's demand; but a court of equity takes every step to bring all the claims before the Court, by advertising for creditors, before a decree is made. [*Parke, B.*—There is another authority, which has not been adverted to, in *Comyns' Digest, Administration, C. 8*:—“If he pays legacies without security to refund, and debts afterwards appear, it will be a *devastavit*.”] That is in favour of the plaintiff. The executor may recover from the legatee; but what meaning is there in giving the executor a right to sue the legatee, unless it is founded on the liability of the executor to pay the debts? At law there is a privity between the creditor and

the legatee. A suit in equity must be against the executor, but it will pursue the assets in whatever hands they may be. The case of the *Chelsea Water Works Company v. Cowper* is much shaken by *Davis v. Blackwell*, and distinctly over-ruled by *Norman v. Baldry*. Besides, the present defendants have never actually parted with the money, but still retain a control over it.

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Lord ABINGER, C. B.—On the point as to the reversion the Court entertain a clear opinion. The other point requires consideration; but the Court have a strong impression that the plaintiff is entitled. It would be hard if the parties were bound in every case to give notice of the existence of a bond.

Cur. adv. vult.

Lord ABINGER, C. B., now delivered the judgment of the Court.—This was an action against the executors of Sir Haylett Framlingham, on a bond which had been given by the testator to indemnify the plaintiff against any claim that might be made for the rent of some premises, of which he had taken an assignment. The pleas were, first, *plene administravit* before the commencement of the suit; and secondly, *plene administravit* before any notice of the existence of the bond. Upon the argument, two questions arose. The first, which was upon the face of the declaration, was whether there was any power of distress, so as to justify the distress made for the rent for the recovery of which this action was brought against the executors. It appeared that, during the continuance of a lease from Sir Thomas Wilson to certain parties, he granted another to Sir H. Framlingham, to take effect from the expiration of the first; and it was contended that he had granted away the reversion immediately expectant on the first lease, and therefore had not the power of making any distress for rent in arrear under it. This point was raised, but not

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very strongly pressed; and the Court expressed an opinion in the course of the argument that there was no assignment of the reversion so as to prevent the power of distress, and therefore that the distress was lawful.

The next point was upon the plea set up by the executors, that they had fully administered. There were certain parts of the residue of the testator's estate which they had invested in their own names in the funds and on a mortgage, changing the security once or twice, for the benefit of the residuary legatees, but which still remained in their charge; and the question was, whether they could be considered as having fully administered the estate, having, without notice of the claim of the plaintiff, paid all the debts and some of the legacies, and apportioned the remainder, as they considered, in satisfaction of the claims of the legatees, on whose behalf they had invested it in the funds. In this state of things, two questions arise: first, whether the executors could give in evidence any payments of legacies under the plea of *plene administravit*; and secondly, whether, in this particular case, the money so invested remaining in their own hands, they could, as to that portion of the assets, sustain such a plea. There is no occasion for us to pronounce any opinion upon the first point, the Court being unanimously of opinion that the executors could not sustain the plea, under the circumstances of this case; they are placed in the situation of having the complete control over the estate of the testator, which remained still in their hands, and which we consider not to be so apportioned by them in satisfaction of any legacies whatever, as to bar the claim of a creditor on a specialty, who was entitled to satisfaction out of the testator's estate. We think, therefore, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

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YOUNG v. GROVE.

THIS was an action of trespass brought to recover damages for a distress levied by the defendant, under the authority of the trustees of Tothill Fields, upon the goods and chattels of the plaintiff, for rates and assessments upon the plaintiff in respect of his dwelling-house and premises, described in the rate-book of the trustees as in the Vauxhall-road, and being situate in the parish of St. John the Evangelist, Westminster, and under which the plaintiff paid the sum of 6*l.* 10*s.* 6*d.* The defendant pleaded the general issue, and thereupon issue was joined; and the parties afterwards consented, under a judge's order, to state the facts for the opinion of this Court, as follows:—

Notwithstanding the provisions of the Vauxhall Bridge Act, 49 Geo. 3, c. 142, the occupiers of houses adjoining the Vauxhall Bridge Road, but lying within the limits of the Tothill Fields' Act, 6 Geo. 4, c. 134, are liable to the paving rate levied under the latter act.

The Vauxhall Bridge Road was made and formed under the provisions of the statute of 49 Geo. 3, c. 142, which is a public act, intitled “An Act for building a bridge across the river Thames, from or near Vauxhall turnpike, in the parish of St. Mary Lambeth, in the county of Surrey, to the opposite shore in the parish of St. John, in the city and liberties of Westminster, and county of Middlesex, and for making convenient roads thereto:” and enactments are contained in such act to the following effect: By section 46, it is enacted, that it should be lawful for the Company of Proprietors (of the said bridge), to set out and make a new road, to pass from the foot of the said intended bridge in a line across the west of Tothill Fields, in the direction therein particularly described, to Eaton-street, opening a communication with Pimlico and Grosvenor-place, passing through the several parishes of St. John, St. Margaret, and St. George, within the said city and liberty of Westminster, together with other roads, when made, should afterwards be kept in repair by the said Company of Proprietors. Section 51 provides that the said roads should be completed within two years

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after the completion of the said intended bridge. By section 89, it is enacted that the said Company of Proprietors, or their committee, shall and may erect and set up one or more gate or gates, turnpike or turnpikes, in, upon, and across the said intended bridge, and also a gate or turnpike in, upon, and across the said intended road leading from Millbank across the west of Tothill Fields aforesaid, and that such tolls should be demanded and taken thereat as therein particularly mentioned. Sections 109, 110, 111, and 112, provide for the prevention and removal of obstructions and annoyances and encroachments on the said bridge and roads, and for infliction of penalties for nuisances, &c. thereon. Section 118 enacts, that it shall be lawful for the said Company of Proprietors, or their committee, and they are thereby empowered and required, from time to time, to cause such and so many lamp-irons or lamp-posts to be put or affixed in, upon, or along the sides of the said bridge, and in, upon, or along the sides of the said roads, or upon or against any wall or palisade of any house, messuage, or tenement fronting any or either of the said roads, as they shall think proper, and also to cause such number of lamps of such size and sorts to be provided and affixed or put upon such lamp-irons and lamp-posts, as they shall think necessary for lighting the said bridge and every or any part thereof, and the said road and every or any part thereof. Section 114 provides for the watching and guarding the said bridge and roads by the said Company of Proprietors. Sections 116 and 117, for the infliction of penalties on parties damaging the mile-stones, watch-houses, lamps, lamp-posts, &c., on the said bridge and roads. Section 120 provides that the bridge shall be considered as half in the parish of St. John, Westminster, and in the county of Middlesex, and half in the parish of St. Mary Lambeth, and in the county of Surrey; but that it shall not be deemed or taken to be a county bridge,

so as to subject the said city or liberty of Westminster, or counties of Middlesex or Surrey, or any of the parishes or places thereinbefore mentioned, or either of them, to the repairing of the same, or any of the roads therein directed to be made as aforesaid. By section 123 it is enacted, that the tolls to be collected and received under and by virtue of that act shall be applied and disposed of, in the first place, in paying the expenses for the time being of carrying the act into execution, and of keeping the said bridge, roads, and access in repair, and of lighting and watching the same, and otherwise as therein particularly mentioned. Section 125 enacts, that if the said bridge, or the said road, lamps, watch-boxes, or other works to be maintained and repaired by virtue of that act, or any part or parts thereof, shall become and be out of repair, or if the said bridge and roads, or any part or parts thereof, shall not continue to be watched or lighted in the manner thereinbefore directed, then the said Company or their committee, or any five or more of them, shall cause the said bridge and roads, lamps, watch-boxes, and other works to be repaired, or the said bridge or roads to be watched and lighted as thereinbefore directed, and in case of failure, within one week after notice to their clerk to that effect, then it shall be lawful for any person or persons to prefer or prosecute any bill or bills of indictment against the said company for such failure, who, if found guilty thereon, shall forfeit the sum of £20^l. for every such failure, and be subjected and liable to commence such repairs as aforesaid, and to cause the said bridge and roads to be watched and lighted as thereinbefore directed, within ten days after such verdict; and in case of failure in the whole or any part thereof, the said Company shall again become liable to such bill or bills of indictment, and so toties quoties until the said repairs of the said bridge shall be completed, or the pavement thereof repaired or relaid, or the same to be watched and

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lighted as thereinbefore directed. Section 141 provides that the bridge should be completed within ten years from the passing of that act.

The road and footpaths from the bridge foot and Milbank to Eaton-street, Pimlico, were completed according to the provisions of the said act, and called "The Vauxhall Bridge Road, or Vauxhall Road;" and immediately after the formation thereof, the Dean and Chapter of Westminster let various portions of their land with frontages in the said road, for building on, and various houses and premises were shortly afterwards erected thereon, and amongst others, the dwelling-house of the plaintiff before mentioned, in or about the year 1817.

The premises in the plaintiff's occupation, of which he was a yearly tenant, and upon which the rate in question was made and levied by the trustees of Tothill Fields, were and are the property of the Dean and Chapter of Westminster, and, in the month of December 1817, were, with other premises, leased by them to Alexander Copeland at an annual rent, who under-let the same for thirty-seven years at an increased annual rent; and such premises consist of a dwelling-house erected in 1817, and of a stable erected in 1833, and of garden ground in the rear thereof, walled in in the year 1833, and previously void ground. The house and stable abut upon, adjoin to, and communicate with Vauxhall Bridge Road on the front thereof, and there are cellars under the footpath of such road; one end of the stable, and the wall of the said garden, abut upon, adjoin to, and communicate with Wheeler-street, which is repaired and cleansed by the trustees of the Tothill Fields Act, but who have never pursued the means provided by the 54th section of the Metropolis Paving Act, hereinafter referred to, for the repair of imperfect paving, or for placing such street under their particular jurisdiction previous to rating the same.

[The case then set forth the following sections of the

Metropolitan Paving Act, (57 Geo. 3, c. 29):—ss. 1, 2, 6, 7, 24, and 54.] *Exch. of Pleas, 1837.*

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By the public act of Parliament of 6 Geo. 4, c. 134, (June 1825), intituled “An act for paving, cleansing, lighting, watching, and improving the streets and public places which are or shall be made upon certain grounds in the parish of St. Margaret and St. John the Evangelist, Westminster, commonly called Tothill Fields,” it is in the preamble stated, that the Dean and Chapter of Westminster are seised of and entitled to grounds in the parishes of St. Margaret and St. John the Evangelist, commonly called Tothill Fields; and that several streets, roads, ways, passages, and places had been made, laid out, and formed, and other streets, roads, ways, passages, and places were intended to be formed, on certain parts of the said grounds, and it would contribute to the benefit and security of the persons who should be inhabitants of the said streets and places, and of persons who shall have occasion to pass along the same, if proper provisions were made for paving, draining, and keeping in repair the said streets and places, and for cleansing, watering, lighting, and watching the same, and for preventing nuisances, annoyances, and encroachments therein; but as the same could not be effected without the aid and authority of Parliament, it is enacted, that certain persons therein named shall be and they are thereby appointed trustees for carrying that act into execution, and shall be called Trustees of Tothill Fields. By section 2 it is enacted, that the jurisdiction, power, and authority of the trustees for carrying that act into execution, and all the regulations, enactments, and provisions therein contained, shall extend over and apply to all lands, grounds, houses, and buildings, and to all streets, roads, ways, passages, courts, and places whatsoever, already made, laid out, and formed, or hereafter to be made, laid out, and formed, comprised within certain limits therein particularly described; and the line whereof twice

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crosses the Vauxhall Bridge Road, and the premises in question are within such limits. By section 22, certain local acts affecting Westminster therein particularly mentioned, so far as the same in any wise relate to or concern the paving, repairing, cleansing, lighting, or watching the several streets and places within the limits or operation of that act or any of them, or any part or parts thereof, or the removing or preventing nuisances, annoyances, and obstructions therein, and also every other act of Parliament and enactment then in force which in anywise relate to or concern the paving, repairing, cleansing, lighting, or watching the several streets and places within the limits or operation of that act, so far as the same in anywise relate to or concern the said several streets and places, or any of them, or any part thereof, other than and except the before-mentioned act of the 57 Geo. 3, c. 29, are repealed. By section 23, the trustees are authorized and empowered from time to time to form or cause to be formed the footways and carriage-ways within the limits of the act, upon such levels and in such manner as they shall think proper; and also to cause, as well the footways next the turnpike-road and other streets and roads not within the limits of the act, on the side of which the houses and buildings within the limits of the act are or shall be erected, as the footways of all other streets, roads, and other public places made and set out, or to be made and set out within the limits of the act, to be properly paved or made sound with gravel or other materials; and to cause the carriage-ways within the limits of the act to be paved, or the channels thereof paved, and the whole or the remainder thereof to be made sound with gravel or other materials; and to cause as well the footways and carriage-ways within the limits aforesaid already formed and paved and made good, as the footways and carriage-ways to be formed or paved or made sound as aforesaid, to be from time to time amended and kept in good repair; and to make sewers and

drains; and also to cause the said roads, streets, and public places to be cleansed, watered, lighted, and watched in such manner as they shall think proper. By section 34 it is enacted, that all and every the enactments, provisions, powers, and authorities contained in the said act of 57 Geo. 3, c. 29, which relate to or concern the appointment of surveyors of the pavement in the several parochial and other districts within the jurisdiction of that act, and for the speedy and effectual reparation of imperfect pavements in the streets and public places within the jurisdiction of that act, shall extend and apply to all footways and carriage-ways whatsoever within the limits of the present act, whether paved in the ordinary manner, or formed of broken granite, flint-stone, or any other material whatever, which shall be or ought to be paved, repaired, amended, or kept in repair by the said trustees; and that all other the enactments, provisions, powers, and authorities in such act contained shall also extend and apply to all the streets and places within the limits of this act, so and in such manner that the said trustees may from time to time and at all times act under and upon all and every the enactments, provisions, powers, and authorities in this act, in the same manner as the commissioners, trustees, or other persons vested with the control or superintendence of the pavement of the streets and public places within the jurisdiction of such act may act under and upon the same, but subject and without prejudice to the restrictions and limitations in this act conditioned, as to the amount of rates to be assessed and imposed within the limits and under the authority of this act. By section 72 it is enacted, that in order to raise money for carrying the several purposes of the act into execution, one or more rate or rates for the purpose of forming and paving, making drains and sewers in, repairing and keeping in repair, watering, lighting, cleansing, and watching the several roads, streets, and places within

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the limits of the act, and also for securing and raising and paying any monies which shall or may be borrowed, and any annuities which shall or may be granted under the authority of the act, and the interest of such monies, and also for answering and satisfying the other purposes of the act, shall be made, levied, and assessed by the said trustees, at yearly, half-yearly, or quarterly periods, or oftener if they shall think necessary, upon all and every persons or person who shall inhabit, hold, use, occupy, possess, enjoy, or be entitled to, any chapel, meeting-house, market, or other public building, house, shop, warehouse, coach-house, stable, cellar, vault, building, workshop, manufactory, garden ground, land, tenement, or hereditament whatsoever, or any part or portion of any house, building, land, tenement, or hereditament, being a separate tenement, situate, lying, and being in any of the roads, streets, or places, within the limits of the act, according to the yearly value thereof respectively. Section 78 provides, that if any house or premises shall appear to be partly within the limits of the jurisdiction of the trustees under this act, and partly in any street or place not within such limits, such house or premises shall be assessed for a proportionable part only of the rent thereof. By section 86, after stating that it has happened, and may happen, that houses and other buildings within the limits of the act have been or may be begun to be built, but not finished nor let, and it is reasonable that such houses and buildings should be rated and assessed for the purposes of the act, it is enacted, that until such houses and other buildings which now are or may hereafter be built or in building shall be finished and tenanted, (if the street or other place wherein such house or other building is or shall be situated shall be paved, repaired, cleansed, and lighted by virtue and in pursuance of the act), it shall be lawful for the trustees to rate and assess all such houses and other buildings in manner therein mentioned. By section 87 it is enacted,

that it shall be lawful for the trustees to rate and assess all and every burying-place, dead walls, and void spaces of ground within the limits of the act, and which are not charged to such rate or assessment in respect of any messuage or other building whereunto they may be appurtenant, at any rate not exceeding in any one year 1s. for every square yard of the foot and carriage-way and other pavements contained in one half of the entire width of so much of every and any such street or public place as shall or may lay before, or at the sides or rear of, or abut upon, or adjoin to such burying-places, dead walls, and void spaces of ground, or any part or portion thereof. By section 88 it is enacted, that it shall be lawful for the trustees to include in any rate or assessment, and thereby to rate or assess all houses, buildings, and ground abutting upon, adjoining to, and communicating with any street, road, way, passage, court, or place which shall be paved, repaired, cleansed, lighted, or watched under the provisions of this act, although such houses, buildings, or grounds may not be comprised within the limits in the act mentioned, except certain hospitals, houses, &c., therein mentioned. Section 120 provides, that nothing in the act contained shall be deemed to affect or interfere with any of the powers, rights, or duties of the trustees of any turnpike roads within the limits of the act: and section 122 provides, that nothing therein contained shall operate or extend to place under the jurisdiction of the trustees for executing that act all or any part of the highway or road called the Vauxhall Bridge Road, but the same and every part thereof shall remain, continue, and be subject to the powers and provisions of the said act of 48 Geo. 3.

The Vauxhall Bridge Road, to the extent of about one-third of its whole length, is within the boundary line of the Tothill Fields district, and the other parts of the road are respectively within the parishes of St. John the Evangelist, St. Margaret, and St. George, Hanover-square, and

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in the latter parish a portion of the said road is within the limits of the Grosvenor Act of Parliament, 7 Geo. 4, c. 58.

No rate or assessment has ever been made by the commissioners or other persons having the control of the pavements in the parish of St. John the Evangelist, and St. Margaret, and St. George, Hanover-square, upon any of the messuages, tenements, or hereditaments in the Vauxhall Bridge Road within their respective parishes, except that the trustees of the Grosvenor Act rate the several inhabitants of such portion of the said road as is within the limits of their said act.

The Vauxhall Bridge Road, throughout its whole length, is repaired, cleansed, and drained by the Vauxhall Bridge Company of Proprietors, and is also lighted by them, except such part thereof as is within the boundary line aforesaid, and along such part certain lamps have been put up by the Tothill Fields trustees. But the Vauxhall Bridge Company have always repaired and cleansed, and do repair and cleanse, the footpaths along the whole of the said road.

The trustees of Tothill Fields insist that the plaintiff is liable to the rates which, by the before-mentioned act, 6 Geo. 4, c. 134, they are authorized to make on all premises within the limits of their jurisdiction; and the plaintiff having refused payment of such rates, which are assessed on the full value of the whole of the said house, stable, and garden, and for the whole amount of the rate, the trustees, by their broker, the defendant, distrained for the same: while the plaintiff insists that his premises are in the Vauxhall Bridge Road, for the repairing, lighting, cleansing, and draining of which special provision is made by the first stated act, and that he is not liable to be so assessed to the Tothill Fields rates, and has therefore commenced this action on account of the distress levied on him. If he is not so liable, then a verdict is to be entered for the plaintiff for 6*l.* 10*s.* 6*d.*, but if he is liable, then a verdict is to be entered for the defendant.

Either party is to be at liberty to refer to any of the provisions of the statutes hereinbefore mentioned.

The question for the opinion of the Court is, whether the plaintiff was liable to be rated for the whole or any part, and what part, of the premises so occupied by him, by the trustees of the Tothill Fields Act.

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Platt, for the plaintiff.—The general rule as to the reparation of roads in front of buildings is, that each occupier shall repair that portion which is directly in front of his own premises. But here, by the Vauxhall Bridge Act, this burthen is taken off the occupiers in the Vauxhall Road; but they are liable, in lieu thereof, to contribute to the general fund provided by the act by means of the tolls. This general liability of the occupiers to the reparation of the street in front of their dwellings is confirmed by the 54th section of the 57 Geo. 3, c. 29, which empowers the commissioners appointed under the act to survey streets which have not been before paved or repaired under any local act, or which appear not to be in sufficient repair, to give notice to the owners or occupiers of the houses, &c. adjoining them to pave or repair the pavements abutting on their houses, &c., and on their neglect to do so, to pave or repair the same at the expense of the owners or occupiers who have made default. [*Lord Abinger, C. B.*—Is not the only question whether the particular property occupied by the plaintiff is within the jurisdiction of the trustees under the Tothill Fields Act?] It is hard that the occupiers of houses in the Vauxhall Road, who must have repaired the frontage there unless the Vauxhall Bridge Company were bound to do so under the local act, should be taxed to repair the streets in front of other houses in other parts of the Tothill Fields district. If a party is assessed to the paving rate of a particular district, he ought not to be liable to pay to any other paving board.

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[*Alderson, B.*—How are the inhabitants assessed to the paving of the Vauxhall Road?—the act says that the road shall be thereafter kept in repair by the Vauxhall Bridge Company. If the company were to become insolvent, who is to repair? I apprehend, nobody.] The company undertakes the charge of paving that particular road: for that purpose the Legislature empowers them to lay a charge, by toll-bars, on the inhabitants. [*Lord Abinger, C. B.*—Only in common with the public. The inhabitants have an advantage, inasmuch as long as the Vauxhall Bridge Company repairs they will never be called upon. How does this exempt them from their general liability to the paving rates on the Dean and Chapter's land?] The 86th section of the Tothill Fields Act empowers the trustees to assess unfinished houses, in streets paved, &c. by virtue of that act. But the Vauxhall Road being paved under a different act, if the house next door to the plaintiff's were all but finished, the trustees could not rate it, although equally within the limits of their trust. [*Alderson, B.*—Surely all turns on the second section, whether the limits there stated include the plaintiff's premises. Suppose I have a house adjoining a road that is repaired *ratione tenuræ*,—does anybody suppose that would exempt me from the general liability to the paving rates of the district? Yet this is just the same case.] It clearly appears from the preamble that the object of the act was to provide for the streets and places which were afterwards to be placed under the jurisdiction of the trustees themselves, and to be cleansed, watched, and lighted by them. [*Lord Abinger, C. B.*—But for the 122nd clause, the 1st section would clearly have embraced the Vauxhall Bridge Road to all intents and purposes; then to what does that clause apply? Plainly to the mere "highway or road," and nothing more.]

Jervis, *contra*, was stopped by the Court.

LORD ABINGER, C. B.—I think there is no difficulty in the case. This local act was introduced by the Dean and Chapter, the owners of the property, to raise a tax for the purpose of improving their own property, without interfering with any other. Then the inhabitants of the Vauxhall Road take advantage of the Vauxhall Bridge Act to save themselves from rate as to that road; but how does that raise any inference that they are to be relieved from liability under the other act? It might equally be said that the General Metropolitan Paving Act, which requires the occupiers to pave the streets in front of their premises, if the commissioners so think fit, exempts them from contribution to the general paving rate. I am of opinion, therefore, that our judgment must be for the defendant.

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BOLLAND, B., concurred.

ALDERSON, B.—For all other purposes than those provided for in s. 122, the Vauxhall Bridge Road remains within the jurisdiction of the trustees, and the inhabitants are just as liable as a party who lives by the side of a road repairable *ratione tenuræ*.

GURNEY, B., concurred.

Judgment for the defendant.

THE ATTORNEY-GENERAL v. KENIFECK.

THIS was an information against the defendant, founded on the 6 Geo. 4, c. 108, s. 45, for assisting, and being otherwise concerned, in the unshipping of foreign tobacco, the

In the beginning of 1832, A., then residing in England, entered into arrangements

with B. for procuring a vessel for the purpose of smuggling tobacco into Ireland. The vessel was accordingly hired by them, and proceeded on her voyage in June, 1832; and having taken on board a cargo of tobacco in the Flushing Roads, arrived and was unshipped at Cork on the 28th of July, 1833, without payment of the duties. An information was filed against A. on the 19th July, 1836, founded on the 6 Geo. 4, c. 108, s. 45, for assisting and being otherwise concerned in the unshipping of the tobacco, the duties not having been paid. A. was not proved to have taken any part in the transaction further than above stated:—*Held*, that he was not triable on this information in England.

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said tobacco then and there being goods liable to the payment of duties of customs, the said duties of customs for the same not having been first paid or secured. The venue was laid in the county of Middlesex. Plea—Not guilty.

At the trial before Lord *Abinger*, C. B., at the Middlesex Sittings after last Hilary Term, it appeared that in the early part of the year 1832, the defendant, then residing in England, made, in conjunction with one *Moylan*, certain arrangements for employing a vessel called the *Lavinia* for the purpose of smuggling tobacco into Ireland. The vessel so employed left England on her voyage in the month of June, 1832, and having taken in a cargo of contraband tobacco in the *Flushing Roads*, arrived with it and ran it into the Cove of Cork on the 28th of July, 1833. The defendant, from the middle of the year 1832, and up to the time that the goods were run, resided in Ireland; but he was not proved to have been concerned in the transaction, beyond the part he took in making the arrangements for employing the vessel as above mentioned. This information was filed on the 19th July, 1836. Two objections were taken for the defendant: first, that the venue ought to have been laid and the information tried in Ireland; secondly, that even if the defendant was triable in England, the only act proved to have been done by him in furtherance of the illegal adventure being more than three years before the filing of the information, he was protected by the limitation of time prescribed by the 6 Geo. 4, c. 108, s. 77. The Lord Chief Baron reserved these points; and the jury having found a verdict for the Crown, *Jervis*, in Easter Term, obtained a rule to shew cause why the verdict should not be set aside, and a verdict entered for the defendant.

The *Solicitor-General*, *Tancred*, and *Kaye* now shewed cause.—The hiring of the vessel by the defendant to go

on this smuggling expedition, with a view to the unshipping of the cargo in Ireland, made the defendant "concerned in the unshipping" the moment it took place. The actual presence of the party during the unshipping is not requisite to make him "otherwise concerned" in the transaction, within the meaning of those words in the statute: *Attorney-General v. Tomsett* (a), *Attorney-General v. Woodmass* (b), *Attorney-General v. Lake* (c). And though the cargo was discharged in Ireland, yet the hiring of the vessel in England is a part of the offence, which renders him triable here. This is either a matter of a transitory nature, over which the Courts here have cognizance—*Attorney-General v. Hines* (d)—or it is a statutory misdemeanor, for which, when the offence is complete, the offender is triable wherever he took a part in it: *Bulwer's case* (e), *Rex v. Burdett* (f). In the latter case, it was held that though the offence of libel consists in the publication, yet the offender might be tried in the county where the writing took place, although it were published in another county. *Holroyd, J.*, there says (g): "Writing a libel, with the intent and for the purpose of its being published, (under circumstances not sufficient to justify or excuse the writer for so doing), followed by a publication by the act or under the authority of the writer, is, in my opinion, by the law of England, a misdemeanor, and triable in the county where such writing took place, though the publication be in some other county." The rule is the same with regard to the offences of treason, conspiracy, &c. But, further, it is enacted by the 6 Geo. 4, c. 108, s. 78, "that *any* indictment or information which shall be found or prosecuted for any offence against this or any other act relating to

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(a) 2 C. M. & R. 170.

(b) Bunbury, 247.

(c) Ibid. 277.

(d) Parker's Rep. 182.

(e) 7 Coke, 1.

(f) 4 B. & Ald. 95.

(g) P. 135.

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the revenue of customs, shall and may be inquired of, examined, tried, and determined in any county of England" (a).

Then if, for his share of the offence, the defendant is properly tried here, the limitation of three years, prescribed by 6 Geo. 4, c. 108, s. 77, raises no objection to this information, because the time must be calculated from the period when the offence was complete by the unshipping, which took place within the three years.

Jervis, contra, was stopped by the Court.

Lord ABINGER, C. B.—This is an information for being concerned in unshipping tobacco: that unshipping took place in Ireland, and no evidence was given to shew that the defendant unshipped, or was actually concerned in the unshipping. It is clear that the part taken by him was not in itself a participation in the act of unshipping; for the goods which he intended should be taken on board might never have been unshipped, or he might have given notice of abandoning the adventure, in which case it could never have been said that he was concerned in the unshipping. The acts done by him were not the offence itself, but only evidence of it. With regard to the case of Sir Francis Burdett, the principle was, that the *publication* is the only offence known to the law, but that the writing and delivering the libel in Leicestershire, with a view to a complete publication in London, was a publication in Leicestershire. Here, the unshipping is the offence, not the hiring of the vessel; and the act does not give us a jurisdiction over offences committed elsewhere, except so far as to make the county immaterial. It takes for granted that each part of the kingdom has its own jurisdiction.

(a) By the 3 & 4 Will. 4, c. 50, s. 122, the jurisdiction to try in any county of England is expressly limited to cases where the offence is committed in England.

BOLLAND, B.—I am of the same opinion. The case in Parker's Reports (a) arose on a question, whether the right of the King to try an information in one county, the offence arising in another, had been taken away; and it was decided that it had not, because that general right could not be taken away without express negative words. The question here is, whether or not the defendant was concerned in the unshipping, so as to make him triable in England. The words are, "shall assist or be otherwise concerned in unshipping," &c. I do not think that either term is satisfied in this case. He was not present, so as manually to assist, nor even living in Ireland at the time, so as to provide a place for the reception of the goods. The part he took in England was no part of the offence described in the act of Parliament.

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ALDERSON, B.—The question is, what is the offence? If any part of the offence arose here, then the offender would be triable here. In *Rex v. Burdett*, though the Court differ on some points, yet they all go on the supposition that the writing is a part of the offence. Here, the offence is the unshipping, and the whole of that was in Ireland. A part suggested to have taken place in England is the hiring of a ship to go on a foreign adventure. Now, though that may be strong evidence to shew that the defendant was concerned in the offence subsequently committed, yet per se it is no part of the offence.

GURNEY, B., concurred.

Rule absolute.

(a) *Attorney-General v. Hines.*

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TIMMIS and Another, Executrix and Executor of RICHARD
TIMMIS, deceased, *v.* PLATT.

If an executor declares on a bill or note payable to his testator, laying a promise to pay him (the executor), such promise may be denied by a plea of non assumpsit, notwithstanding the new rules.

THE declaration stated, that the defendant, on the 11th of March, 1815, in the lifetime of Richard Timmis, made his promissory note in writing, and thereby promised to pay him, the said Richard Timmis, the sum of 100*l.*; and the said sum being due and unpaid, the defendant afterwards, and after the death of the said Richard Timmis, to wit, on the 14th of April, 1831, promised the plaintiffs, as executrix and executor as aforesaid, to pay them the amount of the said note, when lawfully requested so to do, &c. Plea, as to the said supposed promise alleged to have been made to the plaintiffs, as executrix and executor as aforesaid, non-assumpsit. Demurrer and joinder.

R. V. Richards, in support of the demurrer.—Since the new rules of H. T. 4 Will. 4, (Assumpsit, 2), the plea of non-assumpsit is inadmissible in all actions on bills of exchange or promissory notes. [*Parke*, B.—What the defendant means to deny here is the promise to pay the executors. The effect of the plea is to admit that the note was signed by him, but to deny that he made any promise to the executors. How otherwise is he to raise the question on the Statute of Limitations?] The promise to the executors is merely a promise raised by inference of law: but the action is upon the note, and therefore non-assumpsit is inadmissible. [*Parke*, B.—It is not an action on the note, in the sense of that rule.] The mere production and proof of the note would prove the promise. [*Parke*, B.—No, not the promise to the executors.] Suppose the probate put in, (which the plea admits), the law implies a promise to pay the executors. An express promise to an executor is never proved. [*Parke*, B.—If the promise be laid as made to the testator, then it is transferred to the

executor: but this action is brought on an express promise to the executors.] Before the new rules, on this plea, the plaintiff must have proved the note itself; and even now there can be no such promise to pay the executors, unless the note exists, and is a bonâ fide and binding security. The cause of action is still on the note. Every possible inconvenience which the rule was intended to prevent would exist in this case, as much as in an action by the payee on the note itself. Suppose there had been an express promise to pay to the holder after the Statute of Limitations began to run—could the defendant plead non-assumpsit? The plaintiff cannot tell, until the statute is pleaded, whether it will be necessary to prove the express promise. [*Parke, B.*—There nothing would appear on the face of the record to shew that the plaintiff was bound to prove anything more than the promise contained in the note itself: here, there is. Non-assumpsit would undoubtedly be a bad plea in that case.] Then, suppose the plaintiff stated in his declaration that the statute had begun to run, and alleged a subsequent express promise. [*Parke, B.*—I am not prepared to say that in that case non-assumpsit would not be a good plea. Suppose a promissory note were set out as an inducement to an action on a guarantee—might not the defendant plead non-assumpsit?]

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PARKE, B.—It is impossible to say that any promise is implied by law to pay the executors; the *right of action* is transferred to them, but no promise is implied by law to pay them: otherwise the Statute of Limitations would run from the death of the payee, not from the time of the note becoming due. There must be an express promise to the executors, to support the action: the cause of action is the existence of the note, *with* the express promise to the executors to pay the amount of it. But the new rule is confined to cases where the action is *only* on the

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note, and on the promise to pay contained in or implied by law from it: it is to be read as if it were worded thus—
“in all actions on bills of exchange and promissory notes *simpliciter*, without any other matter.”

BOLLAND, B., concurred.

ALDERSON, B.—The real substance of this plea is, not to traverse the promise implied by law from the making of the note, but to deny “a matter of fact from which the contract alleged may be implied by law.” The matter of fact denied is the express promise to the executors, which it was necessary to aver, and which is not a promise contained in the note itself, or anything implied out of it.

Richards then prayed leave to amend, which the Court granted, on payment of costs, otherwise

Judgment for the defendant.

Wightman appeared to argue for the defendant.

HAY and Another v. FISHER.

The first count of a declaration in assumpsit was on a bill of exchange drawn by the plaintiffs upon

and accepted by the defendant in Scotland. The second count, after stating the drawing and acceptance of the bill (which was more than six years before the commencement of the action), set forth at length the making and registering of a protest of non-payment in the Court of Session in Scotland, and the issuing and execution of letters of horning and poinding on the defendant, charging him to make payment of the amount of the bill and interest to the plaintiffs, according to the law of Scotland, and his default thereto; and alleged that, by virtue of the several premises, the defendant became liable to pay the plaintiffs the amount of the bill, with interest; and being so liable, promised to pay the same:—*Held*, that this latter count did not disclose a sufficient cause of action as upon a *judgment* in Scotland.

The particulars stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiffs would rely on the whole or any part of the declaration for the recovery thereof:—*Held*, sufficient to entitle the plaintiffs to proceed on the second count.

after date, at a certain place in Scotland, to wit, at the cellars of the plaintiffs, 103, Hutcheson Street, Glasgow. The count alleged that the bill was duly, according to the law of Scotland, presented and protested for nonpayment, to wit, on the 7th September, 1829.

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The second count stated, that the plaintiffs, on the 15th January, 1829, in Scotland, made their bill of exchange in writing, and directed the same to the defendant, and thereby required him to pay to the order of the plaintiffs, at a certain place in Scotland, to wit, at the cellars of the plaintiffs, &c., 23*l.* 12*s.*, three months after the date thereof, which period had, before the protesting and registering of the said bill and protest as thereafter mentioned, elapsed; and the defendant then accepted the said bill, but did not pay the same when due, although the same was duly, according to the law of Scotland, presented and protested for nonpayment at the place where the same was so made payable as aforesaid when the same was due, to wit, on the 7th September, 1829; and thereupon afterwards, and after the said bill had been so made, accepted, presented, and protested for nonpayment, and after the same was due and payable according to the tenor and effect thereof, to wit, on the 7th September, 1829, the said protest was duly, according to the law of Scotland, registered on behalf of the plaintiffs in the Court of our late Lord King George the Fourth, before the Lords of Council and Session at Edinburgh, in Scotland: and thereupon afterwards, and after the said registering was so made as aforesaid, to wit, on the 8th September, 1829, his said late Majesty's letters of horning and poinding did issue out of the said Court, at the suit of the plaintiffs, against the defendant, directed to certain officers therein mentioned conjointly and severally, to wit, amongst other officers to the messenger at arms, whereby our Lord the said late King charged the said messenger at arms on sight thereof to pass, and in his Majesty's name and authority lawfully command and

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charge the defendant personally or at his dwelling-house, to make payment to the plaintiffs of the aforesaid principal sum of 23*l.* 12*s.* sterling, and the legal interest thereof since the said bill fell due till payment, after the form and tenor of the said bill and registered protest, in all points, within six days next after he should have been charged thereto, under the pain of rebellion and putting him to the horn; wherein if he should fail, the said space being elapsed, immediately thereafter to denounce him his said Majesty's rebel, put him to the horn, and use the whole other order against him prescribed by law: which said letters afterwards, to wit, on the day and year last aforesaid, were duly delivered to W. J., then and from thence until and at the time of the making of the charge thereafter mentioned, being the messenger at arms to whom the said letters were so directed as aforesaid to be executed according to the law of Scotland: and thereupon afterwards, and after the delivery of the said letters to the said W. J. as aforesaid, to wit, on the 9th September, 1829, by virtue of the said letters of horning and poinding raised at the instance of the plaintiffs against the defendant, the said W. J. so then being such messenger at arms as aforesaid, in Scotland aforesaid, passed, and in his said late Majesty's name and authority lawfully commanded and charged the defendant, at his dwelling-house, being in Scotland aforesaid, to make payment to the plaintiffs of the said principal sum and interest, and that within the space of six days then next following, and under the pain of rebellion and putting him to the horn, with certification, a just copy of the said charge in virtue whereof, signed by the said W. J. as such messenger, and bearing a certain date, to wit, the day and year last aforesaid, and also the date and signetting of the aforesaid letters, with the names and designations of the subscribing witnesses, and to the aforesaid effect, the said W. J., so then being &c., then at the time of making the said charge, to wit, on &c., left for the defend-

ant in the hands of a servant within the said dwelling-house, at Port Dundas, in Scotland, to be given to the defendant, because, after due inquiry made by the said W. J. so being &c., for the defendant, the said W. J. could not find the defendant personally at the time of making the said charge or leaving the said copy: all which acts and proceedings were so done, taken, and happened as aforesaid, in Scotland aforesaid, according to the law of Scotland: yet the defendant did not make payment of such principal and interest within the said space of six days, but the same at the expiration of the said six days, and from thence until the promise thereafter next mentioned, continued wholly due and unsatisfied to the plaintiffs; whereupon, and by virtue of the said several premises, after the said six days had expired, to wit, on the 1st October, 1829, the defendant became and was liable to pay to the plaintiffs the said principal sum in the said bill specified, with interest thereon from the time when the bill became due until payment; and being so liable, the defendant thereupon afterwards, to wit, on &c., in consideration of his said liability, promised the plaintiffs to pay the said principal and interest to the plaintiffs on request; yet he hath disregarded his promise, &c. &c. There was also a count on an account stated.

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Pleas, first, as to all the declaration except the first count, non-assumpsit: secondly, as to the first count, that the defendant did not accept the bill in that count mentioned, in manner and form, &c.; thirdly, to the whole declaration, the Statute of Limitations; on which issues were joined.

The particulars of demand annexed to the record were as follows:—"This action is brought to recover payment of the sum of 23*l.* 12*s.*, being the amount of the bill of exchange mentioned in the first count of the declaration, and also the sum of 6*l.* 19*s.*, being the amount of interest due on the said bill at the time of the commencement of

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this suit, &c.; and the plaintiffs will rely upon the whole or any part of their declaration for the recovery thereof."

At the trial before Lord *Abinger*, C. B., at the London Sittings after last Hilary Term, the plaintiffs gave no evidence of the original acceptance of the bill by the defendant; but they put in office copies of the registered protest, and of the letters of horning and poiding (*a*), and the

(*a*) The letters of horning and poiding were in the following form:—

"George the Fourth, &c., to —, messenger at arms, our sheriff in that part, conjunctly and severally, specially constituted, greeting. Whereas our *lovites*, Wm. Hay & Co., spirit merchants in Glasgow, by their bill dated the 15th day of January last, drawn by them upon and accepted by John Fisher, spirit merchant, Port Dundas, ordered the said acceptance, three months after date, to pay to their order, at their cellars, 103, Hutcheson Street, the sum of 23*l*. 12*s* sterling, value in spirits; which bill was, when payable, duly protested at the instance of our *lovites*, the said Wm. Hay & Co., against the said John Fisher for nonpayment of the contents, &c.; and the instruments of protest taken thereupon duly registered in the books of our Council and Session, and a decree of the Lords thereof interponed thereto, of this date, as the same, ordaining these our letters in manner underwritten, and all other necessary execution, to pass thereon, more fully bears:

"Our will is therefore, and we charge you, that on sight thereof

ye pass, and in our name and authority lawfully command and charge you the said John Fisher, personally or at his dwelling-house, to make payment to our *lovites* of the aforesaid principal sum of 23*l*. 12*s* sterling, and the legal interest thereof since the said bill fell due till payment, after the form and tenor of the said bill, registered protest, and decree aforesaid, in all points, within six days next after he is charged by you thereto, under the pain of rebellion and putting him to the horn: wherein if he fail, the said space being elapsed, that immediately thereafter ye denounce him our rebel, put him to the horn, and use the whole other order against him prescribed by law: attour, that ye lawfully fence, arrest, apprise, compel, poid, and distrain all and sundry the said John Fisher's readiest moveable goods, of whatever denomination, poundable or distrainable, and wherever the same can be found make penny thereof, to the avail and quantity of the aforesaid sum, and see the said Wm. Hay & Co. completely satisfied and paid of the same, after the form and tenor aforesaid in all points, according to justice, as

return thereto, and proved the making of the charge and execution of the pointing at the dwelling-house of the defendant, at Port Dundas, near Glasgow, on the 9th and 17th of September, 1829. The messenger at arms duly appraised the defendant's goods, but did not sell them, the landlord having sequestered them for his rent. This action was commenced in August 1835.

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Mr. Mackenzie, a Scotch advocate, who was examined for the plaintiffs as to the proceedings necessary in such a case, by the law of Scotland, to bar the Statute of Prescription, 12 Geo. 3, c. 72, (continued by 23 Geo. 3, c. 18), stated that, according to the Scotch law, a bill of exchange is usually protested on the third day of grace, or, against the acceptor, within six months from that day; then the protest may be immediately recorded in the books of the Court of Session or of the sheriff, and thereupon a warrant of execution may be immediately issued from the Court of Session against the debtor. If no action is raised, or execution issued, within six years from the last day of grace, the bill is affected by the Statute of Limitations; but if diligence is raised and executed, or action commenced, within the six years, the Statute of Limitations is barred, and the party may commence an action at any time within forty years. The witness then described the forms of the process of diligence by protest (*a*), registering the same in

ye will answer to us thereupon. Which to do, we commit to you and each of you full power by these further letters, delivering them by you duly executed and indorsed again to the bearer. Given under our signet at Edinburgh, the 8th day of September, in the 10th year of our reign, 1829.—Per decretum Domini Concilii."

(*a*) This proceeding is founded on the Scotch act of 1681, c. 20, which is in the following terms:—

After reciting "how necessary it is for the flourishing of trade that bills or letters of exchange be duly paid, and have ready execution, conform to the custom of other parts," it is enacted, "that in case of any foreign bill of exchange from or to this realm duly protested for not acceptance or for not payment, the said protest, having the bill of exchange prefixed, shall be registrable within six months after the date of the

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the books of Court, and the issuing and execution of the letters of horning and poinding: and stated that the diligence is complete, so as to bar the prescription, when the debtor has been charged by the messenger to make payment, and of which charge the legal evidence is the return of the officer written on the letters of horning. On cross-examination, he said that the original protest recorded in Court was held to be a *judgment*, and the judgment was complete upon the registration.

For the defendant, it was objected, first, that the particulars delivered, which stated the action to be brought on the bill mentioned *in the first count* of the declaration, did not entitle the plaintiffs to recover under the *second count*, as upon the alleged judgment obtained in Scotland. Secondly, that no judgment or decree of the Scotch Courts was stated in the second count, or proved by the evidence,—at all events none within the period of prescription; that the count was rather a count on the bill of exchange than on a judgment, and the whole of the facts from which the promise was implied were put in issue by the plea of non-assumpsit—among them the acceptance, which had not been proved. The Lord Chief Baron

said bill in case of non-acceptance, or after the falling due thereof, in case of non-payment, in the books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable, or his order, either against the drawer or indorser in case of a protest for non-acceptance, or against the acceptor in case of a protest for non-payment, to the effect it may have the authority of the judges thereof interponed thereto; that letters of horning, upon a simple charge of six days, and executorial necessities, may pass thereupon for the

whole sums contained in the bill, as well exchange as principal, in form as effeirs, sick like and in the same manner as upon registered bonds or decreets of registration proceeding upon consent of parties: Providing always, that if the said protests be not duly registered within six months in manner above provided, then and in that case the said bills and protests are not to have summary execution, but only to be pursued by way of ordinary action, as accords," &c. —By a subsequent act of 1696, c. 36, the former act was extended to *inland bills*.

thought the statement of the bill in the second count was inducement only, and that the count was sufficiently proved: he however reserved both the points for the opinion of the Court, and directed the verdict to be entered for the plaintiffs on the first and third issues, and for the defendant on the second.

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In Easter Term, *Cresswell*, in pursuance of the leave reserved, moved for a rule nisi to enter a verdict for the defendant on the issues found for the plaintiff. The Court refused the rule on the point as to the particulars, saying that the defendant could not have been misled by them, the plaintiffs having stated that they should rely on the whole or any part of the declaration in support of their case. On the other point a rule was granted, against which

Shee and *Addison* now shewed cause.—The question is, whether the proceedings set out in the second count shew a *judgment* within the six years. The evidence of Mr. Mackenzie was express, that the registration of the protest was a judgment according to the Scottish law. The previous statement in the count as to the bill is mere inducement, and it was unnecessary to prove it. The terms of the statute of 1681 shew that this proceeding by diligence is as final in Scotland as any judgment can be. It has all the qualities of a judgment. The object of the registration is “that the authority of the judges may be interponed thereto.” Then follows what would follow upon any judgment—execution, viz. the process by horning and poinding; or the pursuers may have an action on the registered protest, thereby also treating it as a judgment. The 12 Geo. 3, c. 72, treats the proceeding by diligence as equivalent to an action. The 37th section enacts, that no bill of exchange, &c. executed after the 15th May, 1772, shall be of force or effectual to produce any diligence or action in Scotland, unless such diligence shall be raised or exe-

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cuted, or action commenced thereon, within six years from the terms at which the sums in such bills, &c. became exigible. But the act of 1681 also says expressly that execution may pass upon the protest "in the same manner as upon registered bonds or *decreets of registration* proceeding upon consent of parties." And the letters of horning profess to be founded on "a protest duly registered in the books of our Council and Session, and a *decree* of the Lords thereof interponed thereto." [Lord Abinger, C. B.—The form of a declaration on a foreign judgment is to state that by the *judgment* of the foreign Court the plaintiff recovered—and so on. Is there any part of your count which alleges a judgment?] It is sufficient if it sets forth that which is shewn by evidence to be equivalent to a judgment. The judgment is itself *prima facie* evidence of the debt: *Walker v. Witter (a)*, *Crawford v. Whittal (b)*. If then the registration be a judgment, the statement of the bill is mere inducement: if, however, the defendant considered the second count a count on the bill, he should have pleaded accordingly, whereas he has pleaded as to a judgment.

Cresswell, *contra*.—This count is certainly more like a count on a bill than on a judgment. There is no promise averred to pay any sum which the party became liable to pay *on a judgment*; there is no reference to any amount of a judgment. The letters of horning require the defendant to pay the amount of *his acceptance*; the promise, also, averred in the count, is a new promise to pay the amount *of the bill*. The lapse of the six days is alleged as part of the consideration for that promise; it is now said, however, that the judgment is complete by the registration: if so, the count is not proved as laid. [*Parke, B.*—If any one of the matters which precede would make

(a) 1 Dougl. 1.

(b) Cited 1 Dougl. 4.

the defendant liable, that is sufficient. The question is, whether the registration constitutes a new debt, such as to render him liable to be sued upon it in a different country.] Clearly not. Of what Court has there been the "consideration and judgment?" By what tribunal has it been decreed that the plaintiffs are entitled to recover the money? It is contended that the subsequent action is on the diligence, as a new point to start from; but that is not so: the action is in fact still upon the bill; only the registration and subsequent proceedings have effect, in Scotland, of barring the prescription on the bill. [*Parke, B.*—The count ought to have averred, that by reason of the registration according to the Scottish law, the defendant became *indebted*, and so became liable to pay. It only states the liability as an inference from the premises; then the only premises are the registration and subsequent process on an alleged bill, of which the defendant is stated to be the acceptor. If the statement as to the bill be struck out, what cause of action appears? How can we take notice that the process of registration creates a debt?]
—*Cresswell* was then stopped by the Court.

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LORD ABINGER, C. B.—The Statute of Limitations is a good answer to the alleged cause of action on the bill of exchange; in fact, no bill was proved. And we can only, I think, look at this as a count on a bill; all the rest is unintelligible matter, which may form the materials of a judgment, but is not averred to be a judgment. Therefore, as the bill was not proved, the plaintiff was not entitled to a verdict.

PARKE, B.—I am of the same opinion. I think there is not sufficient on the face of this count to warrant a verdict for the plaintiff, independently of the acceptance. The count was not demurrable, because there is enough in the allegation of the acceptance to warrant the conclusion

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that the defendant became liable, and promised to pay. Then, striking out the averment of acceptance, is there a sufficient cause of action remaining? I think not. It ought to have been averred either that the registration was equivalent to a decree, or that there was a decree: then it would have been a question at *Nisi Prius*, whether the proceedings proved were equivalent to a decree. But there is no allegation of that nature, but only a statement of all the proceedings, and that by reason of them the defendant became liable to pay the amount of the bill of exchange. That is only an inference of law from the premises: therefore, to warrant that inference, the plaintiffs ought to have proved the bill. It is true, the plea of non-assumpsit is informal, but it is too late now to take advantage of that.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

DOE *d.* POSTLETHWAITE *v.* NEALE.

Where a plaintiff discontinues, not having given notice of trial, the defendant is not, under any circumstances, entitled to the costs of the drafts or copies of the briefs.

THE defendant Neale having obtained a verdict in an ejectment brought by him for the recovery of the same premises for which the present action was brought, the present lessor of the plaintiff, in Michaelmas Term last, commenced this cross-ejectment to recover them back. The plaintiff, after having been ruled to reply, delivered a replication, but never delivered notice of trial, and subsequently took out a rule to discontinue. The Master, on the taxation of costs, having under the circumstances allowed the defendant the costs of the instructions for the briefs, and the draft briefs, but having disallowed the copies of the briefs, *Chilton*, for the lessor of the plaintiff, and *Wightman*, for the defendant, obtained cross rules for a review of the taxation. It appeared from the affidavit

of the defendant's attorney, that the premises in question were situate near Ulverston, in Lancashire; that the witnesses in support of the defendant's case, who were very numerous, resided in the counties of Westmoreland, Cumberland, and Lancaster; that the defendant and his attorney were both resident in Billericay, in Essex. The briefs, which were necessarily very long, had all been copied before the 11th of March, which was the last day of giving notice of trial for the Spring Assizes, (the commission day at Lancaster being on the 21st), with the exception of the indorsement on one of them. If notice of trial had been given on the 11th, it would not have reached the defendant by post until the 14th, and he could not have arrived at Ulverston until the 16th, leaving him clear three days only (exclusive of Sunday) before the commission day to collect his witnesses and prepare for trial.

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Wightman, for the defendant, contended that this was a case in which the strict rule ought to be relaxed, as the attorney, under all the circumstances, might be well justified in preparing his briefs before the time for giving notice of trial expired.

Chilton, contra.—The draft briefs ought not to have been allowed: the universal practice in the Master's office has been to disallow them where no notice of trial has been given, and it is better to adhere to that rule than to introduce exceptions in particular cases. As to the copies, there is no pretence for asking to have them allowed.

The Master stating that he recollected no other instance in which the drafts had been allowed in such case,

PARKE, B., said—It is best to adhere to the strict practice. As to the copies, there is certainly no ground for asking for them, because, even supposing the attorney

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ought to have been prepared with the draft briefs, he might, on receiving notice of trial, have had them, however long, copied in London in a day.

The lessor of the plaintiff's rule absolute; the defendant's rule discharged, with costs.

GRIFFITH v. ROXBROUGH.

Semble, that in a count on a bill or note, no promise to pay need now be alleged.

At all events, the omission cannot be taken advantage of except on special demurrer.

ASSUMPSIT by the indorsee against the indorser of a bill of exchange, with counts for money had and received, and on an account stated. The count on the bill was in the form given by the rules of Trinity Term 1 Will. 4, not alleging any promise to pay, and the general promise alleged in the conclusion of the declaration was to pay "the said several last-mentioned monies respectively." The defendant pleaded to the first count, that he had no notice of the dishonour of the bill; to the other counts, non-assumpsit: and on the trial before *Gurney, B.*, at the Middlesex Sittings in Easter Term, the plaintiff had a verdict. *Mansel* having subsequently obtained a rule nisi to arrest the judgment, on the ground that the count on the bill was bad for want of the allegation of a promise to pay,—

Fish now shewed cause.—Wherever the declaration discloses facts whence the law will necessarily imply a promise, it is unnecessary to allege one: 1 Chit. Pl. 299; *Starky v. Cheesman* (a), *Mountford v. Horton* (b), *Corbet v. Pakington* (c). *Starky v. Cheesman* is expressly in point. There, a declaration on a bill of exchange against the drawer, stated that the acceptor refused to pay, per quod onerabilis devenit &c., but laid no express promise: the

(a) Salk. 128; Lord Raym. 533;
Carth. 509.

(c) 6 B. & Cr. 268; 9 D. & R.
258.

(b) 2 N. R. 62.

Court held that the drawing of the bill was an actual promise, and held the declaration good on motion in arrest of judgment. That case was confirmed in *Wegersloff v. Keene* (a). In *Buckler v. Angel* (b), where the plaintiff declared that in consideration that he had procured J. S. to surrender a messuage, the defendant *would pay* him 10*l.* when requested, the declaration was held bad after verdict for want of the allegation of an assumpsit. But there, for aught that appeared, the plaintiff might have procured the surrender gratuitously, or under covenant to do it; it was necessary therefore to aver a promise, in order to support the consideration. So, in *Lea v. Welch* (c), where a count in assumpsit for goods sold and delivered was held bad for want of a promise being laid, it was not stated that the defendant either agreed or undertook. In the case of goods sold and delivered, *the law* does not necessarily imply a promise on the part of the defendant to pay for them; they may have been sold on a credit which has not expired, or subject to some other condition. But here, the drawing and acceptance of the bill, the presentment, the nonpayment, and the notice of dishonour, being alleged, the law of itself implies a promise by the defendant to pay the amount. Those are all the facts which the plaintiff could be called on to prove in order to entitle him to recover. In an action for goods sold and delivered, it is *the jury* who infer the promise. In *Wegersloff v. Keene* Fortescue, J., refers (d) to a case of *Lowther v. Conyers*, on a promissory note, in which the want of the super se assumpsit was held not to vitiate the declaration, "because the law raises a promise." [*Alderson*, B.—There there was an express promise on the face of the declaration, by the form of the note itself.] In Bayley on Bills, 408 (5th edit.), referring to *Wegersloff v. Keene*, and *Starky v.*

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(a) 1 Stra. 214.

1516.

(b) 1 Sid. 246; T. Raym. 123.

(d) 2 Stra. 224.

(c) 2 Stra. 793; 2 Lord Raym.

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Cheesman, it is said :—" This clause (the allegation of a promise) is unnecessary in an action against either the acceptor of a bill or the maker of a note, and it may be doubted whether it is essential in any other." The indorsing of a bill or note is as much a promise to pay as the acceptance or making; the only difference being that the acceptor or maker promises to pay in the first instance, the indorser only on the default of the parties primarily liable, and on receiving due notice of that default.

But at all events this omission was cured by verdict. In 1 Saund. 227, note, the rule is thus laid down :—" With respect to the former case (of imperfections which are cured by verdict by the common law), it is to be observed, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer; yet, if the issue joined be such as necessarily required on the trial proof of the facts so imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict by the common law." [*Alderson, B.*—The only issue here was, whether the defendant had due notice. If the question had been on the old plea of non-assumpsit, your argument would have stood better. The ground on which the verdict cures a defect is, that the fact must necessarily have been proved at nisi prius, in order to obtain the verdict. Here all that it was necessary to prove was that the defendant had had notice of dishonour. Suppose the averment of presentment were omitted, would that be cured by verdict?—yet it would not be necessary, on this issue, to prove presentment.] The promise being implied by law from the facts stated, it is equally within the rule as if it had been a necessary part of the proof: *Spieres v. Parker* (a); per Grose, J., in *Mackmurdo v. Smith* (b),

(a) 1 T. R. 145.

(b) 7 T. R. 523.

Starky v. Cheesman was after a judgment by default; the case is much stronger after verdict. In *Henry v. Burbridge* (a), on the authority of which case this rule was obtained, the objection was taken on special demurrer; and *Tindal*, C. J., expressly distinguishes it on that ground from *Starky v. Cheesman*.

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Mansel, in support of the rule.—The declaration is insufficient. The plaintiff shews on the face of it an imperfect title, which does not enable him to sue. The uniform practice has been to allege a promise; and the new rules shew that the judges considered it necessary, because they have said that a promise should be laid in the count itself, even as against the acceptor or maker. Before the new rules, the promise of the acceptor or maker was stated to be to pay "according to the tenor and effect" of the bill or note; not so that of the parties secondarily liable; there the statement was, that "according to the usage and custom of merchants" the defendant became liable to pay on request, and being so liable, promised to pay. The verdict does not cure where the title is in itself imperfect, but only where it is imperfectly stated. The proper form of plea before the new rules—non assumpsit—of itself tends strongly to shew that the promise was a necessary ingredient in the plaintiff's title to sue: and even since the rules, the promise is still material. The replication de injuriâ in assumpsit is, that the defendant "broke his promise" without the cause alleged. Strictly speaking, the defendant is not sued on his mere liability, but on his *promise*. The cases cited on the other side are distinguishable: they only shew that the counts will import the allegation of a *promise* from the statement of an *agreement*. In *Mountford v. Horton*, and *Corbet v. Packington*, there was a specific agreement alleged. In *Starky v. Cheesman*, the plaintiff declared upon the usage and

(a) 3 Bing. N. C. 501.

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custom of merchants, which would create the obligation and raise the promise; but that is now omitted. *Lea v. Welch* is in point for the defendant. [Alderson, B.—Is it not strange that you should say a declaration is bad for not containing an averment which an act of Parliament precludes a defendant from denying? He cannot plead non-assumpsit to a count on a bill. Surely every material fact which it is necessary for a plaintiff to allege or prove, it must be competent to a defendant to deny. But now, by law, he cannot deny the promise]. It is not because the judges were empowered to compel a defendant to deny some particular facts alleged, that the allegation of promise is therefore dispensed with.

BOLLAND, B.—It appears to the Court that this objection ought not to prevail: *Starky v. Cheesman* is a decisive authority against it. Mr. Mansel attempts to distinguish that case, on the ground that there the custom of merchants is set out. But it appears from Bayley on Bills, 382, that no reference to the custom is necessary; the Court takes notice of it.

ALDERSON, B.—I am of the same opinion. It cannot surely be necessary to set out that the defendant promised, when it is not competent to the defendant to deny it by the plea of non-assumpsit; before that was so, the question might be different. The defendant's being obliged to deny "some matter of fact alleged," shews that if the matter of fact alleged be true, the promise to pay necessarily follows: if so, I think it is not necessary to allege it. At all events the omission is mere matter of form, which must be taken advantage of on special demurrer. In *Henry v. Burbidge* it was so; here it is after verdict, and I think it is not a good objection.

GURNEY, B., concurred.

Rule discharged.

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WRIGHT v. LAINSON and Another, Sheriff of MIDDLESEX.

CASE against the sheriff of Middlesex for a false return to a writ of fieri facias. The declaration stated, that heretofore, to wit, on the 30th of August, 1836, the plaintiff obtained final judgment, in the Court of King's Bench, in an action of debt, against one Joseph Hayes, for 200*l.* debt, and —*l.* damages; that the plaintiff sued out a writ of fi. fa., directed to the sheriff of Middlesex, commanding him to levy of the goods and chattels of the said J. Hayes the debt and damages aforesaid, and to have the money before our Lord the King at Westminster immediately after the execution of the said writ; that the writ was duly indorsed to levy the sum of 78*l.* 2*s.* 6*d.*, and delivered to the defendants, as sheriff of Middlesex; by virtue of which writ the defendants, as such sheriff, afterwards, to wit, on &c., seized and took in execution divers goods and chattels of the said J. Hayes. Breach, that the defendants, being such sheriff as aforesaid, not regarding their duty in that behalf, had not the money so levied, or any part thereof, before our Lord the King at Westminster, according to the exigency of the said writ, but therein wholly failed and made default; and that the defendants, after the said levy, to wit, on &c., falsely returned to the said writ that the said J. Hayes had not any goods and chattels in the bailiwick of the said sheriff whereof they, the defendants, could cause to be levied the debt and damages aforesaid, or any part thereof. Plea, Not guilty.

At the trial before Lord *Abinger*, C. B., at the Sittings in London after last Hilary Term, the plaintiff having proved his *prima facie* case, the defendants tendered evidence to prove the bankruptcy of Hayes before the execution of the fi. fa., and thereby to shew that the return of *nulla bona* was not a false return. The plaintiff's counsel objected, that under the plea of not guilty the *falsehood* of

The plea of not guilty, to a declaration in case against a sheriff for a false return of *nulla bona* to a writ of fieri facias, puts in issue only the fact of the sheriff having the money in his hands, and making the return alleged; and it is not competent to him, under that plea, to set up as a defence the bankruptcy of the debtor before the execution of the writ.

An I. O. U. bearing *date* before the bankruptcy of a trader, constitutes no evidence of a petitioning creditor's debt, without some proof that it was in existence before the bankruptcy.

Semble, that where, in an action against a sheriff for a false return to a fi. fa., he sets up as a defence the bankruptcy of the debtor, the petitioning creditor is a competent witness for the defendant.

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the return was not in issue, but only the fact of the defendants having made the return alleged, and therefore that the evidence was inadmissible. His Lordship however received it, giving the plaintiff leave to move to enter a verdict for him, if the Court should think it was not admissible. In order to prove a petitioning creditor's debt, the defendants tendered in evidence certain L. O. U.'s, which were in the handwriting of Hayes, and came from the possession of the petitioning creditor, and bore date before the bankruptcy. His Lordship received them in evidence, but expressed an opinion that they were no proof of the existence of a debt due before the act of bankruptcy. The defendants then called the petitioning creditor himself, who was also one of the assignees under the fiat, and who, it appeared, had not indemnified the defendants. The plaintiff's counsel contended that he was nevertheless incompetent, having a direct interest to support the fiat. The Lord Chief Baron received this evidence also, subject to the same leave of motion; and the jury having found a verdict for the defendants,

Bompas, Serjt., in Easter Term, obtained a rule nisi to enter a verdict for the plaintiff, or for a new trial, on the three points raised at the trial; against which, in the present term,

Alexander, Butt, and *C. R. Kennedy*, shewed cause.—First, the defence was admissible under the plea of not guilty. The question turns on the construction to be put upon the pleading rule of H. T. 4 Will. 4, (IV. 1), which directs, that "in actions on the case, the plea of not guilty shall operate as a denial only of the *breach of duty or wrongful act* alleged to have been committed by the defendant, and not of the facts stated in the *inducement*." The question therefore is, what, on the face of this declaration, is matter of *inducement*? and where does the *breach*

of duty charged begin? Now the rule is, that such things only are matter of inducement as it is necessary for the plaintiff to aver, in order to explain what is his cause of complaint. Applying that rule to the present case, the matters of inducement here end with the allegation of the delivery of the writ to the sheriff. The plaintiff, in order to found his complaint, has to shew a duty in the sheriff, which he does by shewing the delivery of the writ to him. Every subsequent act done by the sheriff is either in furtherance or in breach of his duty; every wrongful act of omission or commission is a breach of the duty so already thrown upon him. The example given of the rule as to actions against carriers, may be referred to in illustration of the present case. There the plea of not guilty is to operate as a denial only of the loss or damage, but not of the *receipt* of the goods by the defendant; or the purpose for which they were received. So, in actions for an escape, it is to operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or *preliminary proceedings*. The *arrest*, therefore, is intended in that case to be traversable under the general issue; so, on the same principle, is the seizure of the goods in this case. The rule certainly leaves the question open, what are the "preliminary proceedings?"—but that must mean the proceedings preliminary to the attaching of the duty, the breach of which forms the ground of complaint. The seizure of the goods is only one of several links in a chain of facts, all contributing to shew that the sheriff did not perform his duty. It is clear the defence here does not consist of matter in *confession and avoidance*—that means matter which shews that when the cause of action has once accrued, it has been in some way discharged. [*Parke, B.*—The delivery of the writ raises *some* duty in the sheriff—viz., to look for the goods of the defendant in his bailiwick; but it does not raise the particular duty you have alleged, viz., to pay over

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the proceeds. There are three stages of duty; first, on the delivery of the writ, to look out for the goods; secondly, on finding them, to levy; thirdly, on levying, to pay over the proceeds.—Would this declaration have been good if everything about the *return* had been left out? If not, it shews that the gist of the action is the *false return*; then not guilty must put in issue the *falsehood*. My doubt is, whether an action *on the case* will lie without an allegation of a false return—the resolving that point will go far to decide the present question.] Here, the goods were not available for the execution, in consequence of the fiat of bankruptcy issued against Hayes; but *in fact* the sheriff did seize goods of Hayes. Any special plea of his bankruptcy would have amounted to the general issue; it would not have been in confession and avoidance, for here there is nothing to confess; the plaintiff sets up no title to the goods, because the interest is in the debtor until sale. There are no authorities directly in point; but all the cases concur in establishing the proposition, that where the quality or nature of the act done is necessarily involved in the issue, the plea of not guilty traverses all the facts that go to prove its quality or nature: *Frankum v. Earl of Falmouth* (a), *Thomas v. Morgan* (b), *Cotton v. Browne* (c), *Spencer v. Dawson* (d), *Lillie v. Price* (e). Here the quality and nature of the act done—the *false return*—is of the substance of the complaint; the plea therefore puts in issue all the circumstances that go to shew whether it was false or not; and that Hayes had no goods, by reason of the bankruptcy, is one of such circumstances shewing it to be false.

Secondly.—The I. O. U.'s were clearly admissible in evidence, as admissions of the bankrupt, and must be pre-

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| (a) 4 Nev. & M. 330; 2 Ad. & E. 452. | E. 312. |
| (b) 2 C. M. & R. 496. | (d) 1 M. & Rob. 552. |
| (c) 4 Nev. & M. 831; 3 Ad. & P. C. 432. | (e) 1 Nev. & P. 16; 5 Dowl. |

sumed, in the absence of evidence to the contrary, to be as genuine in their date as in the amount or the signature. In *Taylor v. Kinloch* (a), Lord Ellenborough, although he entertained some doubt on the point, ruled that the date of a promissory note made by the bankrupt was *primâ facie* evidence to shew that it existed before the act of bankruptcy committed. In *Obbard v. Betham* (b), where Lord Tenterden admitted the same evidence, the additional fact appeared that the note was in existence a few days before the docket was struck. In *Hunt v. Massey* (c), where the question was whether the defendant had ratified, after he came of age, a contract made by him while an infant, it was held that a letter written by him, which was relied on as containing such ratification, must be taken, *primâ facie*, to have been written and issued on the day it bore date. So, indorsements on a bond or promissory note, admitting the receipt of interest, are presumed to have been written at the time they bear date: *Gleadow v. Atkin* (d), *Smith v. Battens* (e). [Parke, B.—In a note in 2 Stark. Evid., 105, it is said that *Taylor v. Kinloch* proceeded on a mistaken report of a case on the Northern Circuit. It is difficult to find any principle on which the mere date is evidence.] But,

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Thirdly, the petitioning creditor was at all events an admissible witness. He had no interest whatever; the assignees had not indemnified the sheriff; there was therefore no privity between the witness and the defendants. The verdict in this case would not be evidence in any action in which the estate was interested, the assignees not being parties or privies to the suit. [Parke, B.—His incompetency is put upon the ground of his having given bond to the Lord Chancellor.] The condition of the bond is, (in conformity with the provisions of the 6 Geo. 4, c. 16,

(a) 1 Stark. 175.

& M. 109.

(b) Moo. & Malk. 486.

(d) 1 C. & M. 414.

(c) 5 B. & Adol. 902; 3 Nev.

(e) 1 M. & Rob. 341.

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s. 13), that the petitioning creditor shall prove as well before the commissioners as upon any trial at law, in case the due issuing forth of the commission be contested and tried, the petitioning creditor's debt and act of bankruptcy, and shall cause the commission to be executed pursuant to the statute; and by the above section, the petitioning creditor cannot be sued on the bond, except upon proof, not only that there was no debt or act of bankruptcy, but also that the commission was taken out fraudulently or maliciously. The *trial at law* here mentioned cannot mean a trial between parties over whom the assignees have no control whatever; it must mean a trial either where the assignees are parties, or where the Court directs an issue to try the bankruptcy: where, if the bankruptcy were not proved, it might be made a ground of a petition for a supersedeas: *Green v. Jones* (a). The mere contingency of the witness becoming suable on the bond is no ground for objecting to his competency: *Carter v. Pearce* (b).

Bompas, Serjt., and *Russell Gurney*, in support of the rule.—First, this defence was not admissible under the plea of not guilty. The *inducement* here comprises every thing that occurred before the actual default complained of, viz. the not paying over the proceeds of the levy. The example given of the action for an escape is conclusive in favour of the plaintiff. There, the default is not in the arresting—that is in *performance* of the sheriff's duty, and clearly forms part of the *preliminary proceedings* mentioned in the rule:—so here, the *levy* is as clearly inducement. [Lord *Abinger*, C. B.—The inducement is that statement of preliminary facts which is necessary to make it understood what is the charge against the defendant.] It is, in this case, the statement of the duty the

(a) 2 Campb. 411.

(b) 1 T. R. 163.

sheriff *performed*, which shews what was his subsequent *breach* of duty. The plaintiff proceeds, not for any breach in not levying, but for a specific false return subsequent to the levy; and states all the previous matters as facts antecedent to the breach of duty charged. The seizure was in performance of the defendants' duty. The declaration would be sufficient if the word "falsely" were struck out: it avers that the sheriff seized and had in his possession goods of Hayes, but that he returned that he had not; that involves the falsehood. In all the cases where not guilty has been held to put more in issue than the mere breach, it will be found that there is no inducement, in the sense above stated. In *Thomas v. Morgan*, the scienter was clearly involved in the issue, as part of the cause of action; it was not inducement, but parcel of the wrongful act charged. So, in *Spencer v. Dawson*, the wrongful act consisted in the falsely warranting that a horse was sound, which in fact was unsound; the denial of the wrongful act therefore involved both the warranty and the soundness. *Cotton v. Browne* falls within the principle of *Thomas v. Morgan*. In that case, *Patteson, J.* says (a), referring to *Frankum v. Earl of Falmouth*, which had been cited in argument: "Where the plaintiff makes an assertion of right, and then complains of an injury done in respect of it, there it is proper for the defendant to answer by denying the right. But here there is no such assertion of right; the whole matter alleged in the declaration is an act of injury." But *Frankum v. Earl of Falmouth* is directly in point. There, unless the plaintiff's right to the watercourse was properly set out in the declaration, there was no wrongful act committed by the defendant's diversion of it: the wrongfulness of the diversion arose out of the previous statements. So here, the return is the breach of duty charged, and its

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(a) 3 Ad. & E. 314.

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wrongfulness depends on the previous inducement. [*Parke, B.*—The question is, if the sheriff sells, and does not pay over the money, can you bring an action *on the case* against him, without connecting it with the false return ?]

[They were stopped as to the second point.]

Thirdly, the petitioning creditor was incompetent as a witness.—It is laid down unqualifiedly in the books, that he is in no case an admissible witness to support the commission, because any case which goes to impeach it necessarily affects his interests: *Tomlinson v. Wilkes* (a), *Ex parte Osborne* (b), *Ex parte Harcourt* (c). Any inquiry, the result of which is to shew that the bankruptcy is not sustainable, might form a ground for superseding it. The words of the act are very general—"any trial at law." [*Parke, B.*—Would it be a forfeiture of the bond, if two persons wholly unconnected with the bankrupt or his affairs were to bet a wager on the validity of the commission, and give notice to the petitioning creditor to give evidence in an action between them on the wager, and he refused ?] However that may be, he is here called upon by a public officer, legally interested in supporting the fiat. The sheriff might have come to the Court, and called upon the other parties to try the question between themselves. He had handed the money over to the witness as the assignee, and it was his duty to come forward and protect that payment. If this action be decided in favour of the plaintiff, the sheriff will have a right to recover the money back from the assignees: *Wilson v. Milner* (d). [Lord Abinger, C. B.—He clearly could not make use of this verdict for that purpose.] It would not be necessary, because he could not recover the costs of this action, and he would recover the levy money by merely shewing that he had paid it over under a mistake. The petitioning creditor has always an interest,

(a) 3 Brod. & B. 397 ; 5 Moore,
172.

(b) 1 Rose, 387.

(c) 1 Rose, 203.

(d) 2 Campb. 452.

but here a direct one; since on this verdict it depends whether he is to keep this money or not. He is in fact the substantial defendant.

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LORD ABINGER, C. B.—As at present advised, we are with Mr. *Alexander* on this latter point; but we are desirous to take some time to consider the other question.

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

LORD ABINGER, C. B.—There was a case tried before me at Guildhall, of *Wright v. Lainson and Another*, the sheriff of Middlesex. It was an action against the sheriff for a false return, and the declaration stated that the plaintiff had obtained a judgment against a debtor, and had issued execution on that judgment, and placed it in the hands of the sheriff; that the sheriff had levied on the goods of the debtor, and received the money; and it then went on to charge the sheriff, that notwithstanding he had made the levy and received the money, he had made a false return of nulla bona. There was the simple plea of not guilty; and on the trial, my Brother *Bompas*, for the plaintiff, contended that nothing else was put in issue but the fact of the alleged return; on the other hand, it was contended that the general issue gave the defendants an opportunity of shewing that they had not committed any breach of duty, for that they had not levied on the goods of the defendant in the original action, he having become a bankrupt. I was then disposed to agree in that interpretation of the new rule; but as it was the first case in which the point had arisen on a question of that nature, I saved the point for the plaintiff, and agreed to go into the case. Accordingly, the case has been argued before the Court,

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and we have all come to the opinion, on a full consideration of the new rules, that the only matter in issue, upon the plea of not guilty, was the fact of the sheriff having the money in his custody, and his making such return as is alleged in the declaration; and therefore we think the verdict ought to be entered for the plaintiff. The rule is this: "In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement." The question is, what does the *inducement* mean? We are of opinion that, according to the terms of the rule, every thing is included in it which does not involve the special charge alleged against the sheriff. The sheriff committed no breach of duty in executing the writ, for the declaration alleges that he did execute it on the goods of the debtor; and that by that process he obtained the price of the goods, equal to the debt demanded; but then comes the breach of duty, viz. that instead of bringing the money into Court, and returning that he had made the levy, he omitted to pay the money to the plaintiff, but returned falsely that there were no goods of the debtor in his bailiwick: the breach of duty alleged consisting of two parts, first, his not having the money ready, and secondly, his making such a return. Now, one point that occurred to me at the trial was, whether this was not altogether a matter on the record; but upon consideration, I think it involves a matter of fact as well as matter of record, which matter of fact (the sheriff's having the money ready to deliver) and matter of record, being bound up together in a single issue, must go to the jury, as is the case wherever law and fact are blended together. We think, therefore, the plaintiff was entitled to the verdict; but as this is the first time this question has arisen, though we are of opinion that a verdict should be entered for the plaintiff on the ground contended for by my Brother *Bompas*, we are disposed to let the

defendants have a new trial on payment of costs, with liberty to amend their plea; and if that is the wish of the defendants, whose counsel is present, the Court will make that rule. [Mr. *Alexander* assented.] Then the verdict will be set aside, and the defendants will be at liberty to amend their plea, and to have a new trial, on payment of costs.

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Rule absolute accordingly.

DOE *d* REES *v.* WILLIAMS and WIFE.

THIS was an action of ejectment to recover possession of a moiety of a freehold dwelling-house and premises, and a moiety of three leasehold cottages, of two leasehold fields, and of a leasehold barn, all situate in the parish of St. Mary, Kidwelly, in the borough of Kidwelly, in the county of Carmarthen. The cause was tried before *Williams, J.*, at the Carmarthen Spring Assizes, 1836, when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

John Stephens, being seised in fee of the entirety of the freehold hereditaments whereof a moiety is in question, and being absolutely entitled to the entirety of the leasehold estate whereof a moiety is in question, under a lease granted to him by a Mr. Pemberton, by his will, duly executed and attested, dated the 31st March, 1795, devised as follows:—

J. S., being seised in fee of freehold estates, and absolutely entitled to leasehold estates under a lease granted to himself, devised the freehold to his wife C. S. in fee, and the leasehold also to her, "during the lives of J. and D. S.," and, if they should survive her, to her heirs. C. S., by her will, devised all her property to trustees (without words of inheritance), on the trusts therein mentioned. She

then bequeathed to them the lands she held under J. S.'s will, to pay an annuity to M. D. for her life. She also bequeathed to W. J. a legacy of 10*l.*, and to C. J. and E. J., her grand-nieces, certain yearly sums, until and during their period of apprenticeship. She then appointed the trustees her executors, and directed that, after all her debts were paid, the residue of her personal and real estate should be equally divided between her said two grand-nieces. C. S. died in 1799, and the two grand-nieces entered, and received the rents of the whole property, subject to the annuity. In 1814, E. J. married, and in 1815 died, after having had a child, which also died. Upon her death, the defendant entered into possession, and received the rents of her moiety. The annuity to M. D. ceased to be payable in 1804; the legacy to W. J. was paid in 1812.

In ejectment brought by the husband of E. J. for her moiety of the freehold and leasehold estates:—*Held*, that, under the will of C. S., the legal fee in the freehold estates vested in the trustees, and that a re-conveyance could not be presumed.

Held, also, that the lessor of the plaintiff, not having shewn that the lease to J. S. was not a lease for lives to him and his heirs, had not made out any title to a moiety of the leasehold estates.

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I give and bequeath unto my well-beloved wife Catherine Stephens, all that house, gardens, messuages, lands, and tenements, situate, lying, and being in Lady-street, in the borough of Kidwelly, and county of Carmarthen, in as ample a manner as they are by me now enjoyed, which house, gardens, messuages, lands, and tenements were part and parcel of lands bought by me of W. O. Brigstocke, Esq.; and it is my further will that the said Catherine shall possess, own, and enjoy the same; she and her heirs, executors, and assigns for ever, to be disposed of as she or they shall think fit. And I do likewise bequeath the lease of Mr. Pemberton's lands, houses, and barn to my beloved wife Catherine Stephens, during the lives of John and David Stephens, if they should survive her, and afterwards to her heirs whom she shall fitt (a), during the said lease. And as to whatever else I shall die possessed of, the marriage settlement made between me and the said Catherine, the 19th day of July, 1773, shall continue in full force, without any infringement, alteration, or change whatsoever. In witness, &c.

The testator died soon after the date and execution of his will, leaving his wife Catherine surviving him, who thereupon took possession of the freehold and leasehold estate of her husband, and continued in such possession till her death.

On the 25th of September, 1799, Catherine Stephens, by her will duly executed and attested, devised as follows:—

All my property real and personal, whatsoever and wheresoever, either in possession, reversion, remainder, or expectancy, I give and bequeath to Mr. Thomas Taylor, of the county of the borough of Carmarthen, and Mrs. Eleanor David, of the Yarmouth Arms, in the said borough, in trust in and for the uses and purposes following;

(a) Sic.

viz., I give and bequeath the houses, lands, and appurtenances I hold and am possessed of by the last will and testament of the late John Stephens, my husband, deceased, into the hands of the said Thomas Taylor and Eleanor David, to pay the sum of *£*2*l.* of sterling English money, viz. 10*s.* on the first quarter day which is next after my decease, and so continue every three months, to Margaret Davies, during the natural life of the said Margaret Davies, and no longer. And I also give and bequeath to William Jenkins, of Hendgrass, in the parish of Llanasthney, in the county of Carmarthen, the sum of 10*l.* of lawful money of Great Britain, to be paid in six months after my decease. And whereas my grand-niece, Catherine Jones, is now apprenticed to Catherine Edwards, in consideration thereof I leave 10*l.* a year to be paid to the said Catherine Edwards, milliner and mantuamaker, of the borough of Kidwelly aforesaid, in regular quarterly payments, for the time of her apprenticeship, ending the 10th day of July, 1801; and after the expiration of her apprenticeship, the said Catherine Jones, her heirs, executors, and administrators, upon attaining years of discretion, shall by herself receive the sum of 5*l.* of lawful money of Great Britain, and in the meantime receive the same by the executors of this will, every year, by regular quarterly payments. And I also give and bequeath unto my grand-niece, Elizabeth Jones, the sum of 4*l.* of lawful money of Great Britain, to be paid her at four regular quarterly payments every year, until she shall attain a suitable age to go to a proper apprenticeship, and that the sum of 4*l.* 4*s.* be paid for such apprenticeship; and the sum of 10*l.* for the first year, and the sum of 10*l.* also for the second year of such apprenticeship; and also the sum of 5*l.* in the year to her the said Elizabeth Jones; in regular quarterly payments, the same as enjoyed by her sister Catherine Jones, to her and her heirs for ever. And I hereby constitute and appoint the above-mentioned Thomas Taylor and Elea-

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nor David executors of this my will, as well as guardian of my two grand-nieces, Catherine and Elizabeth Jones: and that after all my just and lawful debts are paid, the residue of my personal and real property in possession or to come into possession of my said executors, be equally divided between my said two grand-nieces, the legacies otherwise mentioned excepted.

In the month of September, 1799, Catherine Stephens died, without having revoked her will, leaving her grand-nieces Catherine Jones and Elizabeth Jones surviving her; and a short time after her death her said grand-nieces entered into possession of the property so devised by the will of Catherine Stephens to the trustees, Thomas Taylor and Eleanor David, and received the rents and profits thereof to their own use and for their own benefit.

On the 6th of October, 1814, Elizabeth Jones married John Lewis Rees, the lessor of the plaintiff, she at that time being in possession and in the receipt of a moiety of the rents and profits of the freehold and leasehold property, late of John Stephens, and her sister the said Catherine Jones being in possession and in the receipt of the other moiety. After the marriage the lessor of the plaintiff entered into possession of his wife's moiety of the said freehold and leasehold property, and received the rents thereof during her lifetime.

In the month of September, 1815, Elizabeth, the wife of the lessor of the plaintiff, was delivered of a living child, which soon afterwards died, and the wife also died about two months afterwards, leaving her husband surviving; and upon her death the defendants took possession of the whole property, and received both moieties of the rent to their own use, and up to the commencement of this action continued in possession.

The annuity bequeathed to Margaret Davies by the will of Catherine Stephens, was paid to her during her lifetime, and she died in the year 1804; and the legacy

bequeathed to Thomas Jenkins was paid to him about the year 1812. *Exch. of Pleas,*
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John Stephens and David Stephens, named in the will of John Stephens the testator, are still living.

It was agreed at the trial, that if this Court should be of opinion that under the circumstances the jury ought to have been directed to presume a conveyance from the devisees in trust under the will of Catherine Stephens, the parties should be in the same situation as if the jury had found that that conveyance had been made at the time at which the Court should consider such presumption to have arisen.

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The question for the opinion of the Court is, whether the lessor of the plaintiff is entitled to recover one moiety of the freehold or of the leasehold estate late of the testator John Stephens. If the Court shall be of opinion that the plaintiff is entitled to recover a moiety of the freehold estate, and a moiety of the leasehold estate, then the verdict to stand: if they shall be of opinion that the plaintiff is entitled to recover a moiety of the freehold, but not a moiety of the leasehold, then the verdict to be confined to the moiety of the freehold. But if the Court shall be of opinion that the plaintiff is not entitled to recover any part either of the freehold or of the leasehold estate, then a verdict to be entered for the defendant.

The following memorandum appeared in the margin of the case:—The question is, whether the lessor of the plaintiff is tenant by the curtesy of his late wife's moiety of the freehold property, and whether he is entitled by survivorship, in his marital right, to her moiety of the leasehold property.

J. Wilson, for the plaintiff.—The questions as to the freehold and leasehold estates depend on distinct considerations. First, with respect to the freehold. It is clear that Catherine Stephens took a fee under her hus-

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band's will. Under her will her grand-nieces took as tenants in common in fee. If they were ever seised of a legal estate in fee, the lessor of the plaintiff is clearly entitled, as tenant by the curtesy, to recover a moiety. The question therefore is, whether the legal estate ever vested in the devisees during the life of Catherine Jones, or whether it remains in the trustees. There are many authorities to shew that an estate in trustees is limited to the period necessary for the execution of the trusts: *Jones v. Lord Say and Seal* (a), *Doe d. White v. Simpson* (b), *Doe d. Player v. Nickolls* (c). If, therefore, the legal estate vested in the trustees at all, (which is doubtful, *Kenrick v. Beauchlerk* (d),) a reconveyance by them ought to be presumed. [*Parke, B.*—When do you say the trusts were executed?] In 1812, when the legacy was paid to Jenkins, the annuity having ceased to be payable before.

Secondly, as to the leasehold estate. It does not distinctly appear whether the lease was for lives or for years, but in either case the plaintiff is entitled to recover. If it was for years, the lessor of the plaintiff is entitled in his marital right to a moiety; he does not claim representatively, and therefore his not having taken out administration will not affect his right. If it was for lives, yet it must be taken, on the face of the case, to have been granted to John Stephens alone, without words of inheritance, in which case it would vest in his executrix equally with an estate for years, and the conclusion will be the same. The Court will not presume a special occupancy.

Chilton, for the defendant.—With regard to the leasehold estate, it is clear the plaintiff cannot sustain the verdict: if it was a lease for lives in the ordinary terms, it is admitted that he cannot; if it was for years, it was necessary that he should take out administration.

(a) 8 Vin. Abr. 262, pl. 19.

(b) 5 East, 162.

(c) 1 B. & Cr. 336.

(d) 3 Bos. & P. 175.

Secondly, as to the freehold.—The trustees took a legal estate in fee, for the purpose of paying the annuities, and dividing the estate between the grand-nieces. *Kenrick v. Beauchlerk* is distinguishable. There the personal estate was bequeathed to trustees in trust to pay debts; but the devise of the real estate was a direct devise, only subject to (not *after*) the payment of debts; without any direction to the trustees to pay them out of the real estate. In *Doe d. Booth v. Field* (a), where a testator devised all his lands &c. unto and to the use of trustees; their heirs and assigns, upon trust to pay the rents and profits to the separate use of his eldest daughter for life, and after her decease, upon trust to convey them to the use of such person, and for such estates, as she should by her will appoint, and in default of such appointment, to the use of her right heirs, it was held that the trustees took an estate in fee. Here the trustees are to make division of the property between the two grand-nieces, and thereupon to convey to each her moiety. Then the next question is, could the jury have been warranted in presuming that such division had been made? The case itself negatives such a presumption. It is clear that no division was made in fact; for the testatrix having died in 1799, the grand-nieces entered into possession and received the rents during their lives, although the annuity and legacy were in course of payment until 1812. *Doe d. Beesley v. Woodhouse* (b), and *Anthony v. Rees* (c), are additional authorities to shew that the trustees took the legal fee for the purpose of paying the annuities.—The COURT here called upon

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Wilson, in reply.—The question is, whether the trustees have any duty to discharge which would render it absolutely necessary for them to take the legal estate? and if so, for what duration? If their estate, whatever it was,

(a) 2 B. & Adol. 564.

(b) 4 T. R. 89.

(c) 2 C. & J. 75.

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determined during the coverture of Elizabeth Jones, the lessor of the plaintiff is entitled. The leaning of the Court is against the legal estate vesting in trustees, unless it be absolutely necessary for the performance of the trusts: 2 Saund. 11, n. 17; *Kenrick v. Beaucherk*, *Doe d. Woodcock v. Barthrop* (a). Here, the only duty imposed in direct terms on the trustees is to pay the annuity of 2*l.* to Margaret Davies. The provisions which follow may or may not be considered a charge of legacies and debts on the real estate; but a mere *charge* does not vest the legal estate in the trustees, unless they are to take some active part in the payment: 8 Vin. Abr. 262, *Doe d. White v. Simpson*. [Lord Abinger, C. B.—By the concluding clause, the residue of the real property is to be *equally divided* between the grand-nieces. There is no devise to them of real estate till after the debts are paid. By whom is it to be divided? It is the same in effect as a direction to convey.] Such words occur in every case where a testator intends to create a tenancy in common: it is to be equally divided under a decree of a court of equity, on a bill for a partition. The words “after all my debts are paid,” do not postpone the vesting of the interest; that is the ordinary mode in which an estate is charged with the payment of debts. At all events, there is nothing which required the trustees to take more than a chattel interest until the annuity determined, and the legacies were raised: *Doe d. Gord v. Needs* (b).

Then, with regard to the leasehold estate: supposing it to be an estate for years, no administration would be necessary in such a case as this, where the lessor of the plaintiff claims it, not by representation, but in his marital right, the term having vested in him by survivorship as a chattel real: 1 Williams on Executors, 468, and the authorities there cited. And if it be an estate for lives,

(a) 5 Taunt. 385.

(b) Ante, 129.

the case does not state that it was to Stephens and his heirs (a). [*Alderson*, B.—It is tolerably plain, looking at the whole case, that it was a lease for lives in the ordinary terms; the probability is that John and David Stephens were lives in the lease. It is for you, however, to make out that there is no supposition of any lease that will not entitle the plaintiff to judgment.]

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LORD ABINGER, C. B.—I think there can be no doubt, as to the leasehold estate, that our judgment ought to be for the defendant. If it had been found specially that the lease was for years, it would be a different case; but the probability clearly is that it was for lives. As to the freehold, the question turns entirely on this, for what time the trustees took the legal estate. On that point we will take time to consider.

Cur. adv. vult.

The judgment of the Court was afterwards delivered by

LORD ABINGER, C. B.—[Having stated the case, his Lordship proceeded.]—The Court intimated, at the time of the argument, that so far as respected the leasehold estates there ought to be judgment for the defendant: and the only point remaining was, whether the lessor of the plaintiff was entitled to recover the freehold estate. The first question was, whether the trustees under the will of Catherine Stephens took the legal estate. The will is certainly obscure; but on the whole the Court are of opinion that the whole legal estate vested in the trustees; therefore the ejectment cannot be sustained, unless the Court should be of opinion that a reconveyance could be presumed. We

(a) After the first argument for the plaintiff, the case stood over, that it might be amended by inserting a fuller statement of the lease to John Stephens; but the defendant refused to consent to such amendment.

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think that presumption cannot be made, under the circumstances of this case. After the death of the wife, her husband, the lessor of the plaintiff, exercised no acts of ownership. It has never yet been laid down that a jury ought to presume a reconveyance in such a case. Presumptions are made in favour of possession, not against it. The Court being therefore of opinion that the trustees took the legal estate, and that no reconveyance could be presumed, there must be, as to the whole property in dispute,

Judgment for the defendant.

NICHOLL v. WILLIAMS.

Assumpsit for use and occupation, the sum stated in the declaration being 105*l*. The plaintiff delivered particulars as follows:—"The plaintiff seeks to recover in this action the sum of 52*l*. 10*s*., being the balance of one year's rent due from the defendant for the occupation of a farm, &c., which he quitted on the 2nd February, 1833." The defendant afterwards pleaded, as to all but 52*l*. 10*s*., non-assumpsit; as to 52*l*. 10*s*., residue, payment. The plaintiff joined issue on the plea of non-assumpsit, and entered a *nolle* prosequi as to the plea of payment. At the trial, the plaintiff having proved an occupation for several years, at a rent of 105*l*. a-year, the defendant proved payment of all the rent:—*Held*, that the plaintiff was nevertheless entitled to a verdict for nominal damages.

ASSUMPSIT for the use and occupation of a farm and lands of the plaintiff: the sum in which the defendant was alleged to be indebted being 105*l*. The particulars of demand annexed to the record, which bore date before the declaration, were as follows:—"The plaintiff seeks to recover in this action the sum of 52*l*. 10*s*., being the balance of one year's rent due from the defendant for the occupation of a farm and lands of the plaintiff, situate at &c., which the defendant quitted on or about the 2nd day of February, 1833." The defendant pleaded, first, as to all but 52*l*. 10*s*., parcel &c., non-assumpsit; secondly, as to 52*l*. 10*s*., residue &c., payment. The plaintiff took issue on the plea of non-assumpsit, and entered a *nolle* prosequi as to the 52*l*. 10*s*. mentioned in the plea of payment. At the trial before *Coleridge, J.*, at the last assizes for Glamorganshire, the plaintiff having proved the occupation of the farm by the defendant for several years

at a yearly rent of 105*l.*, payable half-yearly, the defendant produced his receipts to shew that he had satisfied all the arrears of rent due, and succeeded, in the opinion of the learned Judge, in establishing that defence. It was objected, however, for the plaintiff, that on this record, as it then stood, such evidence was admissible only in mitigation of damages. The learned Judge directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for nominal damages.

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In Easter Term, *E. V. Williams* obtained a rule nisi pursuant to the leave reserved, against which, in this term,

Chilton and *Leach* shewed cause.—There was no evidence to go to the jury of any sum due beyond 52*l.* 10*s.*, so as to entitle the plaintiff to a verdict for nominal damages on the general issue. [*Parke*, B.—The real question is, whether, if 52*l.* 10*s.* had not been paid, the plaintiff could, under these particulars, have recovered any thing. The argument for the defendant is, that the plaintiff is precluded by his particulars from going for any more than 52*l.* 10*s.*, which 52*l.* 10*s.* is disposed of by the plea of payment.] The defendant is entitled to avail himself of a statement in the particulars as strongly as of an admission on the record, and the plaintiff is strictly confined in his proof to the amount demanded in the particulars: *Colson v. Selby* (a), *Macarthy v. Smith* (b), *Duncan v. Hill* (c). [*Parke*, B.—The defendant cannot succeed without using the particulars: then the whole comes to a question as to the construction of the particulars.] In *Coates v. Stevens* (d), where the particulars stated that the action was brought for 30*l.*, the balance of an account of 40*l.*, and the defendant, among other pleas, pleaded payment of 10*l.*, the Court said that plea was unnecessary,

(a) 1 Esp. N. P. C. 452.

(c) 2 Brod. & B. 684.

(b) 8 Bing. 145; 1 M. & Scott,

(d) 2 C. M. & R. 118.

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as payment of that sum was admitted by the particulars. In *Ernest v. Brown* (a), the Court of Common Pleas certainly held, that in *debt* the defendant could not avail himself of a payment admitted by the particulars, without a plea of payment. *Coates v. Stevens* was there cited, and was distinguished on the ground that it was an action of *assumpsit*.—The Court here called upon

E. V. Williams and *Nicholl*, in support of the rule.—It was not competent to the defendant to go into a case of payment, as an answer to the action, under the plea of non-assumpsit. At the trial, no reference was made by the defendant to the particulars, as controlling the plaintiff's proof; if he had relied on them, he ought to have contended, as soon as he had proved the payments, that the plaintiff was restrained by the particulars from going beyond the 52*l.* 10*s.*, and therefore had no case to go to the jury on the general issue: but the case was met altogether on the ground that the rent had been fully paid. But, without reference to that objection, the plaintiff is entitled to make this rule absolute. If the argument on the part of the defendant be good, then, even if the plaintiff had had the strongest possible case in favour of his claim to an amount beyond 52*l.* 10*s.*, he would equally have been precluded from going into it. Suppose a declaration in 100*l.* for goods sold, and particulars giving credit for the payment of 50*l.*; that goods to the value of 50*l.* had been sold to the defendant, and paid for, and other 50*l.* worth had been sold to a party, as to whom there was a question whether he was a lawfully authorized agent of the defendant or not; the defendant pleads, as to 50*l.*, payment, and as to the residue, non-assumpsit; and the plaintiff enters a nolle prosequi as to the 50*l.* of which payment is pleaded: could the defendant say, "I will restrict you, the

(a) 3 Bing. N. C. 674; 4 Scott, 385.

plaintiff, to the 50*l.*, and as to that I have pleaded payment, which you have admitted?" The right construction of the record is, that the plea of payment should be taken to be addressed to the 50*l.* for which credit was given in the particulars, and the non-assumpsit to deny the rest of the declaration. The plaintiff could not new assign in such a case, because thereby he would abandon one of the sums of 50*l.*, and he would be unable to prove a third. Besides, a new assignment is proper only where the plea assumes to answer the whole declaration; where it does not, the plaintiff may give evidence of that part for which he really goes, on non-assumpsit: Bull. N. P. 17; 1 Saund. 299, a, n. (b); *Barnes v. Hunt* (a), *Hall v. Middleton* (b). If *Ernest v. Brown* be law, the defendant was bound to plead to the sum of 52*l.* 10*s.* for which the plaintiff has given him credit. Any distinction between debt and indebitatus assumpsit could hardly be the foundation of the judgment in that case: non-assumpsit and nunquam indebitatus equally negative the existence of a state of facts from which the legal promise is to be implied: and if the particulars operate as an admission of part payment, that admission cannot be used in either case without a plea of payment. There will be great inconvenience in treating the particulars as of force to control the record, because they are of a shifting nature: the record alone ought to be looked at in considering the effect of the pleas, and the particulars used only as matter of evidence. Here, however, the defendant having it in his power to plead payment generally, has chosen to plead it as to 52*l.* 10*s.* only, and by pleading the general issue also, to lead the plaintiff to suppose that he denies the occupation as to the residue. [*Parke, B.*—You say, that if you had taken issue on that plea you would have been beaten, because you have a right to say the defendant addresses himself

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(a) 11 East, 451.

(b) 4 Adol. & E. 107.

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to that sum of 52*l.* 10*s.* for which you have given him credit.] That is the argument: he ought to have pleaded payment generally, whereas he chooses to address himself to the particulars, independently of the record. [*Parke, B.*—The plaintiff is wrong in the first instance; he should have declared for 52*l.* 10*s.* only.] That is so; but so is every plaintiff who goes for a larger sum than he claims by his particulars. Here there clearly had been an occupation sufficient to surmount the whole 105*l.*

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The plaintiff in this case declared for use and occupation, stating the defendant to be indebted in the sum of 105*l.* Before declaration, the defendant applied for particulars of the plaintiff's demand, which were accordingly given in this form:—"The plaintiff seeks to recover in this action the sum of 52*l.* 10*s.*, being *the balance* of one year's rent, &c." The year's rent being admitted to be 105*l.*, the particular is equivalent to a statement that the plaintiff proceeds for 52*l.* 10*s.*, half a year's rent, the other half-year's rent being paid. The defendant pleaded, as to all but 52*l.* 10*s.*, non-assumpsit; and as to the 52*l.* 10*s.*, residue, payment. The plaintiff joined issue on the plea of non-assumpsit, and entered a nolle prosequi as to the plea of payment. On the trial, before my Brother *Coleridge*, the plaintiff went into his case; the defendant produced his evidence on the question whether the whole year's rent was paid or not; and the learned Judge intimated his opinion that it was, and directed a verdict for the defendant; but reserved liberty to the plaintiff's counsel to move to enter a verdict for nominal damages. In the course of the discussion, the particulars annexed to the record were referred to by the defendant's counsel, but he did not use them in the early

part of the case, to confine the plaintiff as to proof. A rule nisi having been obtained to enter a verdict pursuant to the leave reserved, the question now is, whether it ought to be made absolute. We are of opinion that it ought. The whole question turns upon the true construction of the particulars and pleadings in this case, taken together. The particulars were given before the declaration; but as they were never amended, they must stand as if they had been delivered with the declaration, or afterwards. These particulars in substance admit the payment of 52*l.* 10*s.*, a half-year's rent; and the question is, whether the plea of payment of 52*l.* 10*s.* refers to the sum so admitted, or to the balance which the plaintiff seeks to recover. If the defendant had understood at the time of the trial that it referred to the latter, he would naturally have instructed his counsel to insist (which he did not) on restricting the plaintiff to going into any proof at all; for in that view of the case there would have been no question to try, after the plaintiff had admitted payment. On the other hand, unless he had meant at the time of pleading to apply the plea of payment to the 52*l.* 10*s.* in question, he would have pleaded improperly with a view to his intended defence. We have a difficulty in saying what the defendant intended, but we must construe the plea as we think it would have been understood by the plaintiff or any other person. Now, as it was optional in the defendant to use the particulars or not on the trial to restrain the plaintiff, the plaintiff could not tell whether they would be so used; and finding the plea of payment of 52*l.* 10*s.*, a *part* of the demand, and knowing that such amount had been paid, he could not safely have taken any other course than to admit the payment—he could not have acted upon the plea as having any other meaning than a plea of part payment of the demand. In that sense we think the plea must be understood. And if the recent unreported decision (a) of the

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(a) Since reported; see ante, p. 760.

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Court of Common Pleas, in *Ernest v. Brown*, be right, that the defendant could not have availed himself of the part payment admitted in the particulars, by restraining the plaintiff in point of evidence, and must have pleaded part payment, there can be no question as to the meaning of the plea. We do not, however, feel it necessary to decide whether the defendant was bound to plead payment, after such a particular as this, or not; for we think, without relying on that case, we must construe the plea as intended to apply to the payment admitted. To avoid similar questions in future, the obvious course which ought to be pursued in the like cases is for the plaintiff to adopt the mode of declaring, which we have been informed is now not unfrequent—to aver the part payment in the declaration, or to insert in the declaration the real amount which the plaintiff seeks to recover. We are of opinion that the rule must be made absolute.

Rule absolute.

KENYON v. WAKES.

Assumpsit for wages. Plea, non-assumpsit. The particulars of demand stated a claim for wages at 15s. per week, amounting altogether to 148*l.*, and gave credit for payments on account to the amount of 70*l.* At the

ASSUMPSIT for wages. Plea, non assumpsit.

At the trial before Lord Abinger, C. B., at the Middlesex Sittings after last Hilary Term, the plaintiff proved his service to the defendant for a period commencing in April 1833, and ending in October 1836, for which he claimed payment at the rate of 15*s.* per week. The defendant insisted that he was only liable to pay wages at the rate of 7*s.* a week, and if so, he contended that the whole trial, the defendant put the particulars in evidence, as shewing a payment of 70*l.*; and the jury having found that the plaintiff was only entitled to wages at the rate of 7*s.* per week (which destroyed the balance of 78*l.* claimed by the plaintiff) gave a verdict for the defendant:—*Held*, that the particulars were properly received in evidence as an admission of the payment; and, it not having been objected at the trial that they could only be used in reduction of damages, and not in bar of the action, that the verdict ought not to be disturbed.

Quære, whether payments admitted in the particulars need be pleaded (a).

(a) This case was decided earlier in the term than the preceding.

demand was satisfied, as appeared from the plaintiff's particulars. The particulars were in the following form:—

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To money paid by the plaintiff for the defendant, and for money lent by the plaintiff to defendant, at various times from May 1833 to September 1836	£	s.	d.
	11	18	8½
To wages from April 22, to September 26, 1833, at 15s. per week	16	17	6
To wages from October 1st, 1833, to October 22, 1836, at 15s. per week	119	5	0
	148	1	2½
Payments on account	-	70	0 0
	78	1	2½

It was objected for the plaintiff, that the defendant could not use the particulars without taking the whole together, and if that were done, then that they shewed a balance against him; and secondly, that they could not be used at all for the purpose of shewing a payment, unless there were a plea of payment on the record. The Lord Chief Baron, however, allowed the defendant to use the particulars as evidence; and the jury having found that the plaintiff was entitled to 7s. a week only, which destroyed the balance of 78*l.* 1*s.* 2½*d.* claimed by the plaintiff, they gave a verdict for the defendant. *Humfrey* having, in Easter Term last, obtained a rule to shew cause why there should not be a new trial,

Thesiger now shewed cause.—The particulars of demand having admitted the payment of 70*l.* on account, the case stands precisely the same as if there had been a plea of payment of 70*l.* which was admitted, and so much struck out of the declaration. The only claim for which the plaintiff proceeds is the balance of 78*l.* The case of

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Booth v. Howard (a), which was cited at the trial, only decided that the particulars are not incorporated in the declaration as a part of it, and has no bearing on the present case. There *Patteson*, J., says: "They (the particulars) are for the benefit of the defendant, and although the defendant might have pleaded as to the 8*l.* 9*s.* 6*d.* the general issue, and as to the residue of the demand payment of 5*l.* into Court, and would, I think, have taken a better course if she had so pleaded, yet I am not prepared to say that she was bound to do so." The particulars shewed that the plaintiff is suing for the balance of 78*l.*, which is founded upon the claim for wages at the rate of 15*s.* a week, and which balance is ascertained not to be due by the finding of the jury. The verdict was therefore right.

Platt and Humfrey, contra.—The particulars of demand cannot be considered as incorporated in the declaration. According to the decision of the Court of Common Pleas last Term in *Ernest v. Brown* (b), payment must be pleaded, notwithstanding an admission of such payment in the particulars of demand. [*Parke*, B.—How can the plaintiff avoid the costs of a *nolle prosequi* if he discontinues on a plea of payment, otherwise than by an admission in his particulars?] By excluding that sum from his declaration, or by expressly admitting it in his pleading as a payment made on account, and then alleging a promise to pay the difference. [*Parke*, B.—That would be a singular course (c). Would the payment admitted be a traversable fact? Lord *Abinger*, C. B.—What would non assumpsit put in issue in such a case?] The promise alleged, which is to pay the difference. [*Parke*, B.—The plaintiff would have to prove such a promise. From what time would the Statute of Limitations have to run? Lord *Abinger*, C. B. You would make the declaration a statement of a special

(a) 5 Dowl. P. C. 438.

(b) 4 Scott, 385; 3 Bing. N. C. 674.

(c) But see the preceding case.

contract on an account stated.] Such a form is not now unfrequent in practice. At all events, the defendant not having pleaded payment in bar, he can only give the particulars in evidence in reduction of damages.

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LORD ABINGER, C. B.—It is not necessary to give an opinion on the last point, as that was not taken at the trial. The particulars were put in to shew that the plaintiff limited his claim to the balance, if any, due for wages. The jury were of opinion that there was no balance due. The particulars only claimed a balance, which was destroyed by the finding of the jury.

PARKE, B.—I think this rule ought to be discharged, because the objection that the plaintiff was at all events entitled to nominal damages, was not taken at the trial. Had that point been raised, we should have had to consider a question which must soon be determined, viz. whether a payment admitted by the particulars must be pleaded. Had it not been for the decision of the Court of Common Pleas in *Ernest v. Brown*, I should have had little or no doubt upon the subject. Before that case I entertained a strong opinion, and so expressed it in *Coates v. Stevens* (a), that such a payment need not be pleaded. I thought that the particulars were given to the defendant to enable him to know what to plead, as well as to restrain the plaintiff's proof of the claim in his declaration. In that view I agree with the decision of *Patteson, J.*, in *Booth v. Howard*, that the particulars are for the benefit of the defendant. It is said that in *Ernest v. Brown* a distinction was taken between debt and assumpsit, with reference to this point. I cannot understand that distinction, nor am I at present satisfied that my first impression on this point, which I expressed in *Coates v. Stevens*, was

(a) 2 C. M. & R. 118.

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wrong. As to the argument that the jury ought to take the whole of the particulars together, if at all, it is every day's practice to leave to a jury the credit which a statement made by a party in his own favour is entitled to, and they may give credit to one part of the statement and disbelieve the other.

The rest of the Court concurred.

Rule discharged.

BARRY v. GOODMAN.

An instrument in these terms—
“I hereby certify that I remain in the house, No. 3, Swinton Street, belonging to W. G., on sufferance only, and agree to give him immediate possession at any time he may require.”
—*Held*, not to amount to an agreement for a tenancy, so as to require a stamp.

TRESPASS for breaking and entering the plaintiff's house and expelling him therefrom, and removing his goods: to which the defendant pleaded liberum tenementum. At the trial before Lord Abinger, C. B., at the Middlesex Sittings after Easter Term, it appeared in evidence that the plaintiff having been some time in possession of the house in question, the party under whom he occupied conveyed the premises to the defendant, and the plaintiff then gave the defendant the following written memorandum:—“I, David Barry, hereby certify that I remain in the house No. 3, Swinton-street, belonging to Mr. William Goodman (the defendant) upon sufferance only, and agree to give immediate possession to the said William Goodman at any time he may require. 6th July, 1836.”

On this document being tendered in evidence on the part of the defendant, it was objected for the plaintiff that it required a stamp, for that it amounted to an agreement for a new tenancy, not to a mere attornment. The Lord Chief Baron overruled the objection, and the defendant had a verdict.

Kelly now moved for a new trial, and renewed the same objection. This memorandum amounted to an agreement for a tenancy, although on sufferance only, and ought

therefore to have been stamped: *Cornish v. Searell* (a). There *Holroyd, J.*, says: "Attornment is the act of the tenant's putting one person in the place of another as his landlord. The tenant who has attorned continues to hold upon the same terms as he held of his former landlord. But here the agreement is for a new tenancy, and is for a time and upon conditions which may vary from those in the former lease, according to the agreement of the parties." Such is the case here also: a new tenancy on different terms, viz. by sufferance, is created between these parties. The plaintiff will not be a trespasser until required to give up possession. In *Cornish v. Searell* the instrument gave the plaintiff no more interest than amounted to an excuse for a trespass, unless an agreement were subsequently made; it communicated only a right to remain in possession for an uncertain time, which might be determined the next hour. The memorandum in the present case gives no less. The plaintiff does not engage with the new landlord merely on the terms of the old. [*Alderson, B.*—It seems to be a mere certificate that the former lease has expired.] Except by this paper, no privity was shewn between the parties; there was no evidence that the defendant was any thing but a mere stranger down to the time of its being signed.

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LORD ABINGER, C. B.—It appeared to me that this was a mere admission that the house was the house of Goodman, and that he, the plaintiff, had no interest whatever in it. As to the agreement to give it up, that followed as a matter of course; no stipulation to give it up was necessary.

The rest of the Court concurred.

Rule refused.

(a) 8 B. & Cr. 471; 1 Man. & R. 703.

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GOUGH v. BRYAN.

Case for driving a coach of the defendant against the plaintiff's carriage, in which were two of his sons, and injuring it and them. Plea, stating that the plaintiff's carriage was under the guidance and direction of one of his sons, who was driving it, and that the defendant, by his servant, was carefully and properly driving his coach; that if the plaintiff's son had driven his carriage carefully and properly, no collision would have taken place, nor any injury have been occasioned to the plaintiff's carriage or to his sons; but that the plaintiff's son drove the carriage so negligently and improperly, that it ran and struck against the defendant's coach, and by means thereof, and without any carelessness or improper conduct of the defendant by his servant, the defendant's coach ran and struck against the plaintiff's carriage, whereby the supposed damages in the declaration mentioned were occasioned: so that if any damage was occasioned to the plaintiff's carriage or to his sons, it was occasioned by the carelessness, negligence, and improper conduct of the plaintiff's son so driving his carriage: without this, that the defendant, by his servant, so carelessly and improperly drove his coach, that by and through his carelessness and improper conduct in that behalf, the defendant's coach struck against the plaintiff's carriage, in manner and form, &c.; concluding to the country:—*Held* bad on special demurrer.

CASE.—The declaration stated that the plaintiff, on the 10th day of March, 1837, was lawfully possessed of a carriage called a chaise, and of a horse then drawing the same, and in which said carriage A. G. and M. G., the sons and servants of the plaintiff, were then riding in and along a public and common highway; and the defendant was also then possessed of a common stage coach then used by him for the conveyance of certain passengers from London to Clapton, and of two horses then drawing the same, and which said coach and horses were then under the care, government, and direction of a certain servant of the defendant, who was then driving the same; nevertheless the defendant then, by his said servant, so carelessly and improperly drove, governed, and directed his said coach and horses, that by and through the carelessness and improper conduct of the defendant by his said servant in that behalf, the said coach of the defendant ran and struck with great force and violence upon and against the said carriage of the plaintiff, and crushed and injured it, and broke one of the shafts thereof, &c. &c.

Pleas, first, not guilty. Secondly, that before and at the said time when, &c., the said carriage of the plaintiff, and the said horse then drawing the same, were under the guidance, government, management, and direction of one of the said sons of the plaintiff, who was then driving the same in and along the said highway, and the said servant of the defendant was then carefully, skilfully, and properly driving the said stage coach of the defendant,

conduct of the defendant by his servant, the defendant's coach ran and struck against the plaintiff's carriage, whereby the supposed damages in the declaration mentioned were occasioned: so that if any damage was occasioned to the plaintiff's carriage or to his sons, it was occasioned by the carelessness, negligence, and improper conduct of the plaintiff's son so driving his carriage: without this, that the defendant, by his servant, so carelessly and improperly drove his coach, that by and through his carelessness and improper conduct in that behalf, the defendant's coach struck against the plaintiff's carriage, in manner and form, &c.; concluding to the country:—*Held* bad on special demurrer.

and the horses drawing the same, in and along the said highway: and the defendant further says, that if the said son of the plaintiff, who was so then driving the said carriage and horse of the plaintiff in and along the said highway, and so had the guidance, management, government, and direction thereof, had driven, guided, governed, managed, and directed the said carriage and horse of the plaintiff carefully, skilfully, and properly, and in as moderate a manner as he ought to have done, no collision would have taken place between the carriage of the plaintiff and the said stage coach of the defendant, nor would any damage or injury have been occasioned to the said carriage and horse of the plaintiff, or either of them, or to the said sons and servants of the plaintiff, or to either of them; but he further says, that just before and at the said time when, &c., the said son and servant of the plaintiff who so had the guidance, government, management, and direction of the said carriage and horse of the plaintiff, drove, guided, managed, and directed the same so carelessly, negligently, unskilfully, and improperly, and with such velocity and violence, in and along the said highway there, that the said carriage of the plaintiff, at the said time, when, &c., ran, struck, and was driven with great force and violence upon and against the said stage coach of the defendant, and by means thereof, and without any carelessness or improper driving, government, or direction of the said coach and horses of the defendant, and without any carelessness, improper conduct, or default of the defendant by his said servant, the coach of the defendant ran and struck upon and against the said carriage of the plaintiff, whereby the supposed damages and injuries in the declaration mentioned were caused and occasioned as therein alleged; and so the defendant says, that if any hurt or damage then happened or was occasioned to the said carriage and horse of the plaintiff, or either of them, or to his said sons and servants, or either of them, the

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same happened and was occasioned by the carelessness, negligence, unskilfulness, and improper conduct of the said son and servant of the plaintiff who was so driving the said carriage and horse of the plaintiff; and which running and striking of the said coach of the defendant upon and against the said carriage of the plaintiff in this plea mentioned, and caused and occasioned as in this plea mentioned, were and are the supposed running and striking of the said carriage of the defendant against the plaintiff in the declaration mentioned, and whereof the plaintiff has above thereof complained against the defendant; without this, that the defendant at the said time, when, &c., by his said servant, so carelessly and improperly drove, governed, and directed his said coach and horses, that by and through the carelessness and improper conduct of the defendant by his said servant in that behalf, the coach of the defendant then ran and struck, &c., in manner and form as the plaintiff has above thereof complained against him the defendant: concluding to the country.

Special demurrer, on the ground that the plea was argumentative, and amounted to the general issue, and that divers unnecessary and superfluous matters were stated in it, and also divers of the matters contained in it were stated hypothetically, and without any certain or positive or direct allegation thereof. Joinder in demurrer.

Russell Gurney, in support of the demurrer, was stopped by the Court.

Kelly, in support of the plea.—The question is, whether, since the new rules, the plea is open to a special demurrer, on the ground that it amounts to what is now called the general issue in case. The old general issue was much more comprehensive than the new plea of not guilty. Before the new rules, release or payment might have been given in evidence under the general issue, though they

might also have been pleaded. A plea, therefore, would not then have necessarily been bad because amounting to the general issue. But the objection here can only be that the plea amounts to *not guilty*—not to the *general issue*; they were synonymous until the new rules, but they are not so now: there is now no *general issue* in case. Each of the three allegations in the declaration—the possession of the plaintiff—the possession of the defendant—and his negligence, is equally necessary to the maintenance of the action, and the denial of any of them fatal to it: the denial of the negligence goes under the old name of “not guilty,” but it is in fact no more than the others—a denial of a particular allegation in the declaration. [*Alderson, B.*—The reason of the rule was, that by the general issue you give the plaintiff an opportunity of several replications, whereas by pleading the same defence specially you drive him to one replication, taking issue on one fact. If indeed the *general issue* raises one fact only, that reason does not apply.] Here the plea of not guilty would only have the effect of raising an issue on the mere fact of negligence; this plea therefore puts the plaintiff in no different condition. The object of the new rules was, that the parties might know the precise issue to be tried; and that object is furthered by such a plea as the present. But further, inasmuch as it is consistent with the allegations in the declaration that the injury arose partly by the plaintiff's negligence, (which would be an answer to the action), the traverse in this form does not necessarily amount to the general issue as at present framed. [*Lord Abinger, C. B.*—The plea denies any negligence; but the declaration ascribes the whole injury to the defendant's negligence. The plea therefore is in effect the same as not guilty. *Alderson, B.*—The whole of the inducement here appears to be superfluous. The only effect of an inducement is to raise the law for the consideration of the Court, and to qualify the effect of the special traverse: but this induce-

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ment does no such thing.] It may be questioned whether the introduction of merely superfluous matter is ground of special demurrer; the proper course is to apply to a Judge to have it struck out.

LORD ABINGER, C. B.—I am of opinion that this plea is bad. The principal ground on which a special plea amounting to the general issue has been held bad on special demurrer, is, that it contains superfluous and unnecessary matter. As this plea concludes to the country, this perhaps forms the only objection to it; if it had concluded with a verification, it would have been more vicious, because it would drive the plaintiff, in his replication, to select some particular fact to take issue upon. I do not accede to the proposition that the new rules have altered the nature of the general issue; they have only circumscribed the species of evidence which may be given under it, but have still left the general issue, as pleaded to such parts of the declaration as it applies to, the same, and all the old objections arising on it equally sustainable as before.

BOLLAND, B., concurred.

ALDERSON, B.—It is laid down in Comyns' Digest (a), that "when a man has no special matter for his justification or excuse, he ought to plead the general issue, *to avoid prolixity in the record*." I take that to be the rule applicable here.

GURNEY, B., concurred.

Judgment for the plaintiff.

(a) Pleader, E., 13.

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BRIND v. DALE.

ASSUMPSIT. The declaration stated that the defendant, before and at the time of the making of the promise thereinafter mentioned, was a common carrier of goods in and by a certain cart, from divers places to divers other places; and thereupon the plaintiff theretofore, to wit, on the 14th November, 1836, at the request of the defendant, caused to be delivered to him, as such carrier, a certain trunk containing certain goods and chattels therein particularly described, to be taken care of and safely and securely carried and conveyed by the defendant, as such carrier, in and by the said cart, from a place called Nicholson's Wharf to a place called Brook's Wharf, and there to be safely and securely delivered by the defendant for the plaintiff. The declaration then alleged in the usual terms a promise by the defendant safely to carry and convey and deliver the goods, and a breach in not carrying safely, whereby the trunk and its contents were lost.

Fifth plea, that at the said time when he, the defendant, received the said goods and chattels from the plaintiff, and at the time the said supposed promise of the defendant was made, an express condition and agreement was then made and entered into between the plaintiff and the defendant, that is to say, that whilst the defendant carried and conveyed the said trunk with the said goods and chattels in and by his said cart from the said place called Nicholson's Wharf to the said place called Brook's Wharf, he the said plaintiff would accompany and follow the said cart of the defendant, and watch and protect the said goods and chattels from being stolen or lost out of the said cart; but that the plaintiff, contrary to the said condition and agreement in that behalf, wholly neglected and refused to accompany and follow the said cart, or to watch and protect the said goods and chattels from being

Assumpsit against the defendant as a common carrier, to recover the value of goods delivered to him, to be taken care of and safely carried by him, as such carrier, in his cart, from N. to B., and there safely delivered by him for the plaintiff, but which were lost by his negligence.

Plea, that when the defendant received the goods, an express condition and agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen; but that he neglected and refused so to do; by reason whereof, and not by reason of any negligence of the defendant, the goods were lost:—*Held* bad on special demurrer, as amounting to the general issue.

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stolen or lost from the said cart; by reason whereof, and not by reason of any negligence, carelessness, or improper conduct in the defendant or his servant, the said goods and chattels were lost. Verification.

Special demurrer, assigning for causes, first, that the said plea does not properly confess the promise in the declaration; secondly, that the matter of defence in the said plea amounts to the plea of non-assumpsit, and ought to have been so pleaded. The marginal note stated, that the plaintiff would also contend that the plea was bad in substance, inasmuch as the engagement entered into by the plaintiff, without consideration, could not limit the defendant's liability as a common carrier.

Barstow, in support of the demurrer. The defendant is in this dilemma—either the plea amounts to the general issue, or it is no answer to the action. It sets up a contract different from and incompatible with that alleged in the declaration. The Court then called upon

W. H. Watson, to support the plea.—The declaration alleges the defendant to be a common carrier, and avers a delivery to him as such. Though that allegation be true, there may yet be a special agreement, by way of qualification of his general liability. [*Parke, B.*—The declaration says, the goods were delivered to be taken care of by the defendant; the plea says they were not.] The defendant says in substance, “I admit I received the goods as a common carrier, but I made also a collateral agreement that the plaintiff should watch them.” The defendant would have his remedy over against the plaintiff for not watching the goods pursuant to his agreement, and so, to avoid circuity of action, it is set up in the plea in discharge of the plaintiff's cause of action. [*Parke, B.*—The effect of the agreement is to protect the carrier from theft or loss: that qualifies the contract.] If the

Court is of opinion that it amounts to a qualification of the plaintiff's contract, not to a substantial and collateral contract, the plea certainly cannot be sustained.

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Per Curiam—

Judgment for the plaintiff.

WOODS v. REED.

THIS was an action of trespass, brought by the plaintiff against the defendant for the seizing and taking of certain goods of the plaintiff. The defendant pleaded the general issue—not guilty; and issue having been joined thereon, the following case was, by consent of the parties, stated under a judge's order for the opinion of the Court.

Under the Municipal Corporation Act, 6 Will. 4, c. 76, s. 92, the council of a borough have no power to make a retrospective rate.

After the passing of the act of Parliament 5 & 6 Will. 4, c. 76, "for the regulation of municipal corporations in England and Wales," various expenses had been and were necessarily incurred in and by the borough of Stamford, in the county of Lincoln, being one of the boroughs within the operation of that statute, in carrying into effect the provisions of the said act. And the borough fund of the said borough not being sufficient for the payment of such expenses, at an adjourned meeting of the council of the said borough, pursuant to notice before then given for that purpose, duly held at the Town Hall, in and for the said borough, on Saturday the 13th May, 1837, at which the mayor and the major part of the councillors of the said borough were present, the council of the said borough estimated, as correctly as might be, what amount, in addition to the borough fund, would be sufficient and necessary for the payment of the expenses which had been so incurred in carrying into effect the provisions of the said act, the amount of such estimate being 2316*l.* 2*s.* 1½*d.*; and by an order then duly made at such meeting, after

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reciting that by the accounts of the said borough and otherwise, it appeared that since the passing of the said act of Parliament various expenses had been necessarily incurred in the said borough, in carrying into effect the provisions of the said act therein, and that the borough fund of the said borough was not sufficient for the payment of such expenses, and that a considerable sum in addition to such fund would be necessary for that purpose; and that it appeared to the said council so assembled, and they had estimated and did thereby estimate as correctly as might be, that the sum of 2316*l.* 2*s.* 1½*d.* was necessary and sufficient to be raised, in addition to the said borough fund, to satisfy and pay the expenses so incurred in carrying into effect the provisions of the said act of Parliament; It was ordered by the said council, that a borough-rate in the nature of a county-rate should be made in the said borough, for the purpose of raising the said sum of 2316*l.* 2*s.* 1½*d.* so estimated, and for that purpose that there should be assessed, and the said council did thereby assess, upon every parish thereafter named, (the same respectively lying and being within the borough aforesaid), the several and respective sums of money thereafter mentioned to be charged on every such parish respectively, that is to say—

Upon the Parish of All-Saints	-	£ 639	10	4½
Upon the Parish of Saint Mary	-	179	2	9
Upon the Parish of Saint Michael	-	502	2	9
Upon the Parish of Saint John	-	266	18	0
Upon the Parish of Saint George	-	397	13	8½
Upon the Parish of Saint Martin	-	342	2	4½

The same being and after the rate of 2*s.* 1½*d.* in the pound upon the full and fair annual value of the messuages, lands, tenements, and hereditaments rateable to the relief of the poor therein; and the said council did thereby further order, according to an act of Parliament made in the

fifty-fifth year of the reign of his late Majesty King George the Third, intituled "An Act to amend an Act of his Majesty King George the Second, for the more easy assessing, collecting, and levying county rates," and the several other acts of Parliament relating thereto, and the said act of 6 Will. 4, that the churchwardens and overseers of the poor of each and every parish aforesaid respectively, out of the money collected or to be collected for the relief of the poor of each and every such parish respectively, should pay to the high constable of the said borough the respective sums of money so as aforesaid rated and assessed upon such parishes respectively, within a certain time in the said order mentioned next after demand thereof made in writing, to be given to the said churchwardens and overseers of the poor of the said parishes respectively, or any of them, or left at their or any of their houses, or affixed on one of the church doors of such parish to which such officers should belong, by the said high constable, which demand the said high constable was thereby directed to make with all convenient speed; and that the said high constable, being also the treasurer of the said borough, should pay over the said monies, when received, to the account of the borough-fund, to be applied for the purposes of and pursuant to the provisions of the said last-mentioned act: and that in case such churchwardens and overseers of the poor, or any of them, should neglect or refuse to pay any of the sum or sums of money thereby assessed, after demand as aforesaid, the said high constable should and he was thereby empowered to levy the same by distress and sale of the goods and chattels of such overseers of the poor so refusing or neglecting to pay the same as aforesaid, by warrant for that purpose first had and obtained under the hand of the mayor of the said borough, and the seal of the said borough, rendering the overplus, if any there should be after deducting the money assessed and the charges of

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In pursuance of the said order, the defendant, being the high constable of the borough, and who held a warrant for collecting the said borough-rate, issued his warrant to the overseers of the poor of the said parish of Saint Mary, in the said borough, requiring them to pay to him, within the period so described for that purpose, out of the money collected or to be collected for the relief of the poor of the said parish, the said sum of 179*l.* 2*s.* 9*d.*, being the proportion of the last-mentioned parish, to be paid for and towards the said borough-rate in the nature of a county-rate, mentioned in the said order. The overseers of the poor of the said parish of Saint Mary neglected and refused to pay any part of the said sum of 179*l.* 2*s.* 9*d.* to the defendant, the high constable, within the limited time; and the said sum being in arrear, the plaintiff, who was one of the overseers of the said parish at the time the said order for the borough-rate was made, and has held that office continually from that period, was duly summoned, according to the provisions of the statute, for the nonpayment thereof, and a warrant of distress was thereupon granted under the hand and seal of the Mayor of the borough, directed to the defendant, requiring him forthwith to make distress of the goods and chattels of the plaintiff and Joseph Barfield, the other overseer of the said parish, who had also refused to pay, and been summoned for the nonpayment of, the said sum of 179*l.* 2*s.* 9*d.*; and the said defendant was thereby commanded, that if within the space of five days next after such distress by the defendant so to be taken, the said sum of 179*l.* 2*s.* 9*d.*, together with reasonable charges of taking and keeping the said distress, should not be paid, the defendant should sell the goods and chattels so distrained, and out of the money arising by such sale should detain the sum of 179*l.* 2*s.* 9*d.*, and also his reasonable charges of taking, keeping,

and selling the said distress, rendering to them the said overseers the overplus on demand.

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Under this warrant the defendant took and distrained the goods mentioned in the declaration in this cause.

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The question for the opinion of the Court is, whether the council of the said borough could, by virtue of the said statute 5 & 6 Will. 4, c. 76, legally order a borough-rate in the nature of a county-rate to be made within their borough, for the payment of the said expenses which had before then been incurred in carrying into effect the provisions of the said act.

If the Court should be of opinion in the affirmative thereof, then the plaintiff agrees that a judgment should be entered against him of nolle prosequi, immediately after the decision of this case, or otherwise as the Court may think fit: but if the Court should be of a contrary opinion, then the defendant agrees that judgment shall be entered against him by confession for 40*s.* damages, immediately after the decision of this case, or otherwise as the Court may think fit; and that judgment shall be entered accordingly.

Alexander, for the plaintiff.—The question depends on the construction to be put upon the 92nd section of the Municipal Corporation Act, 6 Will. 4, c. 76, whereby it is enacted, that “in case the borough fund shall not be sufficient for the purposes thereinbefore mentioned, the council of the borough is thereby authorized and required from time to time to estimate, as correctly as may be, what amount, in addition to such fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of the act; and in order to raise the amount so estimated, the council is thereby authorized and required from time to time to order a borough-rate in the nature of a county-rate to be made within their borough;” and for that purpose the council are to have all the powers

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which are given to justices in sessions by the 55 Geo. 3, c. 51. The language of these provisions is altogether prospective. The council are to *estimate*—a term clearly prospective in its operation—the money necessary for payment of the expenses *to be* incurred. This is a proceeding altogether different from *calculating* what is sufficient for payment of expenses which *have been* incurred. The reference to the 55 Geo. 3, c. 51, strengthens this conclusion. The justices would clearly have no power under that act to make a retrospective rate: *Rex v. Justices of Flintshire* (a). The same is established with respect to church rates: *Rex v. Chapelwardens of Hayworth* (b), and gaol rates: *Cortis v. Kent Water Works Company* (c).—*The Court* then called upon

N. R. Clarke for the defendant.—It is impossible to contend that the rates are always to be made prospectively, consistently with other provisions of the act. Debts must of necessity have been incurred before there existed a council who could make a rate at all. It could not have been the intention of the legislature that debts should be incurred by a borough which it should have no means of paying; all that is intended is, that the new municipal bodies shall not be liable to the debts of the old corporation. The expenses for which they are to make provision are therefore to be expenses “to be incurred”—that is, to be incurred after the passing of the act. Again, they are to estimate the amount “as correctly as may be;” the act therefore contemplates that they may be short in their estimate; if so, may they not make a new rate for the overplus? It must often be impossible to calculate precisely *à priori* what will be the amount required. *Rex v. Justices of Flintshire* is not an authority against the defendant: that

(a) 5 B. & Ald. 761; 1 D. & R. 470; 2 D. & R. 843.

(b) 12 East, 556.

(c) 7 B. & Cr. 314.

was the case of a rate made to *reimburse* parties for a debt previously contracted, which was undoubtedly bad. [*Alderson*, B.—The general principle is, that you cannot charge a man for services which have been of no use to him. Of what benefit are the services of last year's recorder to a man who comes to reside in the borough this year?] Every one who comes into the borough has the means of knowing the amount of the existing charges on the rates: by section 93, accounts of the receipts and disbursements are to be entered by the treasurer in books to be kept for that purpose, and when audited, a full abstract of the accounts is to be printed, and to be open to the inspection of all the rate-payers. [Lord *Abinger*, C. B.—That is after the accounts have been made up and passed.] The first election of councillors after the passing of the act was to be presided over by the old mayor, who was authorized to provide polling books, &c.; and the expenses of that election are, by section 92, to be paid out of the borough fund, and if that be insufficient, by means of a rate. These were expenses "to be incurred" in carrying into effect the provisions of the act (a). It is very different where they are expenses not necessarily incurred until the council have money in their hands. A churchwarden is not bound to lay out any money until he has funds in his hands; and on that ground *Rex v. Chapelwardens of Haworth* was decided. Again, the objections to retrospective rates have always been in cases where the money was advanced to *reimburse* some party. If a retrospective rate be in all cases invalid, the only mode whereby the council can secure themselves is, by making a rate for too much, which will be productive of more injustice than

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(a) It was admitted, in the course of the discussion, that a considerable part of the amount assessed by the rate made in this case was

for the expenses of the first year's registration, and the salary of the recorder for the first two years.

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the making of a retrospective rate. Are all the officers who have been employed in the borough—watchmen, constables, &c.—all the parties who have trusted the corporation, to lose their salaries and payments? By section 83, special constables are to be called out by the justices in case of need, and to be paid a certain amount a day by the council. This is a demand which could not be foreseen or estimated. [*Alderson, B.*—You might urge the same argument as to county and poor's rates: the answer is, they must have money in hand. *Lord Abinger, C.B.*—They would then provide for that extraordinary expense out of the funds in hand, and immediately make a new rate to supply it.] Suppose the case of a rate quashed for some technical informality,—would not the legislature have made provision for that case, if they had intended that the rates should be prospective only? More injustice will be done by making excessive rates, and so taxing for future expenses inhabitants who may leave the borough in the meantime, than by taxing all the actual inhabitants for expenses already incurred.

Lord Abinger, C.B.—We must construe the act of Parliament according to its words, and any imaginary or even real inconvenience which may result to any particular borough cannot govern our judgment: otherwise there would be one law for Stamford, and another for Nottingham:—this is a general law, and must be construed generally. If the words of the clause were not so clearly prospective, we might perhaps take advantage of the ambiguity to give some latitude to their construction; but they are plainly prospective only. The *general* inconvenience of retrospective rates has been long known and recognised in the courts of law, on the ground that succeeding inhabitants cannot legitimately be made to pay for services of which their predecessors have had the whole benefit. But here, independently of that general rule,

the act contains words which are in their nature prospective only. If they had reference to past expenses, they would have been described as matter of *calculation*, not of *estimation*; and the words "to be incurred" must necessarily be read in conjunction with the word "estimate"—that is, to be incurred after the estimate is made. Can we read the words "to be incurred" as meaning "which have been incurred?" I think not. I am of opinion, therefore, that this rate was invalid, and that our judgment must be for the plaintiff.

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BOLLAND, B.—I am of the same opinion. It is clear from the former part of this section that the legislature went upon the presumption that each borough had the funds necessary to meet past expenses, but contemplating cases in which the borough fund would not be sufficient for future expenses, they provide for the case by the words in question. As soon, then, as the councillors are elected, they may sit down and estimate, as well as they can, looking to the amount of expenses incurred before, what sum will be sufficient, whether for the year or any portion of it, to meet the demands that may arise. To put any other construction on the act would give a party an opportunity of staying in the borough till the rate was just on the point of being made, and then leaving it, and evading the payment of his proportion altogether; and so make the party coming in in his stead pay for the whole of the past year.

ALDERSON, B.—I think the act intended that the rates should be prospective only, and not retrospective, and that it never intended to give a borough the power of incurring expenses first, and then levying rates to meet them: but they are first to *estimate* the expenses, and then to impose the rates. And there is good reason for such a direction: the council is much more likely to be economical

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when the money is to come out of their pockets in the first instance, than when they first incur the debt, and afterwards provide the means for paying it. What are the expenses to be provided for? The payment of officers whom the council "shall appoint," and so forth. Otherwise, the council might impose on the borough the cost of heavy salaries, and leave upon their successors the odium of levying money to pay them. It appears to me, therefore, not only that the legislature have said that the rates shall not be levied retrospectively, but that they have done wisely in saying so.

GURNEY, B., concurred.

Judgment for the plaintiff (a).

(a) In consequence of this decision, the 7 Will. 4 & 1 Vict. c. 81, s. 2, was passed, which enacts, "that it shall be lawful for the council of any borough" [in which, by the 6 Will. 4, c. 76, or by this act, a borough rate may be levied] "at any time within six calendar months next after the passing of this act, to make and levy a borough rate for the purpose of defraying

any expenses incurred before the passing of this act, in putting into execution the provisions of the said act for regulating corporations (6 Will. 4, c. 76); and every such rate shall be made, levied, and recovered in the manner provided by the said act for regulating corporations, and by this act."

THURNELL v. BALBIRNIE.

Assumpsit for the value of goods, which the defendant

THE first count of the declaration stated, that before and at the time of making the agreement and the pro-

agreed to purchase at the valuation of N. and M. Averments, that N. was ready to value for the plaintiff, but that the defendant and M. refused to value for the defendant; that the plaintiff gave notice to defendant that his valuer, N. was ready to meet M., or any other valuer the defendant might appoint, at any time within ten days which the defendant might fix for making the valuation; that the defendant refused to appoint any day for that purpose, and refused to appoint any other valuer, or to take any steps to value the goods or procure them to be valued, according to his agreement, and has ever since refused to value them, or to let them be valued, according to his agreement: whereupon, after the lapse of a month, N. valued them, and the price amounted to &c.; alleging a breach in not taking the goods and paying such amount:—*Held*, on demurrer, that the count was bad; for that the defendant could not be liable for the price of the goods until they had been valued by both valuers, pursuant to the agreement; at least without a distinct averment that the defendant refused to permit M. to value.

mise and undertaking of the defendant thereafter mentioned, the defendant held, occupied, and enjoyed, at his request, certain rooms, apartments, and premises of the plaintiff, as tenant thereof to the plaintiff, the same then being part and parcel of a dwelling-house of the plaintiff, and in which there were certain goods and fixtures and chattels, to wit, &c., of the plaintiff, of great value, to wit, of &c. ; and thereupon heretofore, to wit, on the 26th of December, 1836, it was agreed by and between the plaintiff and the defendant in manner following ; that is to say, the plaintiff then agreed to sell and deliver to the defendant, who then agreed to purchase and take of the plaintiff, the said goods, fixtures, and chattels, at a valuation to be made by certain persons, to wit, Mr. Newton and Mr. Matthews, or their umpire : and the plaintiff said, that the said Mr. Newton was appointed by and on behalf of the plaintiff, and the said Mr. Matthews by and on behalf of the defendant, to value as aforesaid. The declaration then averred mutual promises, and alleged that Newton, on behalf of the plaintiff, was ready and willing to value the said goods, &c., and at the request and by the authority of the plaintiff requested Matthews to value the same, whereof the defendant and Matthews had notice ; but that the defendant and Matthews then and thence continually neglected and refused so to do : and the plaintiff further said, that he the plaintiff afterwards, to wit, on the 2nd of February, 1837, gave notice to the defendant that the plaintiff's said appraiser and valuer, the said Newton, was ready to meet the defendant's appraiser and valuer, the said Matthews, or any other person he might think proper to nominate for the purpose on the defendant's behalf, at any time within ten days from the said 2nd of February, which the defendant might fix, to value the said goods, &c., of which the defendant then had notice, but then and thence hitherto wholly neglected and refused to appoint any day for his appraiser, the said Matthews, to value,

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and wholly neglected and refused to nominate any other appraiser, and during all that time has wholly refused and neglected to take any steps to value as aforesaid, or to cause or procure the same to be valued according to his said agreement and promise, and has during all the time aforesaid wholly refused to value the said goods, &c., or to let the same be valued, according to his said agreement and promise: And thereupon the said Mr. Newton, afterwards, and after the lapse of a reasonable period of time, to wit, one month from the day and year last aforesaid, proceeded to value and did then value the said goods, &c., and the price thereof upon such valuation reasonably amounted to the sum of 500*l.*, whereof the defendant had notice, and was requested to pay the same to the plaintiff: and the plaintiff further says, that he hath always from the time of making such valuation as aforesaid been ready and willing to sell and deliver to the defendant the said goods, &c., and to receive payment by him of the value thereof, whereof the defendant hath always had notice; yet the defendant, not regarding, &c., did not nor would, although often requested, take the said goods &c. so agreed by him to be taken as aforesaid, and pay the plaintiff the value thereof, but hath hitherto wholly neglected and refused so to do, whereby, &c. &c.

There were also counts for goods and fixtures bargained and sold, and on an account stated.

Special demurrer to the first count, assigning, amongst other causes, the following; that the count does not sufficiently allege a breach of the defendant's promise therein mentioned, for that it does not allege that the defendant hindered or prevented the said persons appointed and agreed on to make the said valuation, or either of them, from making such valuation. And also that it is alleged by way of breach that the defendant refused to take the goods, &c., agreed by him to be taken, and that he also refused to pay to the plaintiff the value of the said goods, &c., and

no agreement or promise is stated in the said count, to take the said goods, &c. at their value generally, or at the valuation made by the said Mr. Newton, but at the valuation only of the said Newton and Matthews, or their umpire. Joinder in demurrer.

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Kelly, in support of the demurrer.—There are many objections in point of form to this count; but the substantial question is, where two persons are by agreement appointed to make a valuation of goods, and one refuses, can either party be liable for a breach of the agreement? How could the defendant be bound to take or pay for the goods until they had been valued according to the agreement? [*Gurney*, B.—It is not said that Matthews omitted to value by the procurement of the defendant.] It is just as if an action were brought against a party to a submission, because one of the arbitrators refuses to make an award.—The Court here called upon

Hoggins, to support the declaration.—It is specifically averred in the count that the defendant had notice that the plaintiff's appraiser was ready to value, and the breach assigned is, that he then wholly refused to *let the goods be valued* according to the agreement. It is submitted that that is sufficient to render him liable for the price. In *Hot-ham v. East India Company* (a), it was held, that where the defendant, by his neglect and default, prevented the performance of a condition precedent in a charter-party, that was equivalent to a performance by the plaintiffs. In *Raynay v. Alexander* (b), where the plaintiff declared in assumpsit for nondelivery of fifteen tods of wool purchased by him out of seventeen of which the defendant was possessed, the declaration was held bad for want of an allegation that the plaintiff had selected fifteen tods of the seventeen, which was an act to be first performed by him: but

(a) 1 T. R. 638.

(b) Yelv. 76.

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the Court said, if the defendant would not have permitted the plaintiff to see the wool, that he might make election, that had excused the act to be done by the plaintiff, and had been a default in the defendant. If these cases be law, the facts alleged in this declaration make the defendant liable as for goods bargained and sold.

LORD ABINGER, C. B.—I am of opinion that this count is bad. The agreement stated is an agreement to purchase the goods on the valuation of Newton and Matthews. There is no distinct allegation that the defendant refused to permit Matthews to value on his part; but only an obscure statement that he refused to appoint any day for his valuing, or to take any steps to value or to cause and procure the goods to be valued according to his agreement, and that he has refused to value the goods, or to let them be valued, according to his agreement: all which comes after the allegation that Matthews had refused to value, there being no statement that he had changed his mind and was ready and willing to do so, but that the defendant would not permit him. I am of opinion, therefore, that enough is not stated to render the defendant liable for the price of the goods.

BOLLAND, B., concurred.

ALDERSON, B.—I should refer the words "or to let the same be valued," &c., to the defendant's letting the goods be valued by another appraiser instead of Matthews, according to the notice which the plaintiff says he gave him.

GURNEY, B., concurred.

Leave to amend on payment of costs; otherwise
Judgment for the defendant.

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OAKES and Wife v. WOOD.

TRESPASS for assaulting the female plaintiff, and, with the defendant's hands, and with a truncheon, striking her on the head, ribs, legs, &c., and beating, bruising, wounding, and ill-treating her, and with the said truncheon striking and thrusting her down to and upon the ground, by which means she was greatly beat, bruised, and wounded, and her thighbone was broken. Pleas, first, not guilty; secondly, as to assaulting, beating, and ill-treating the female plaintiff, that before and at the time when &c., the defendant was lawfully possessed of a public-house, into which the said female plaintiff, a little before the said time when &c., entered, and made a great noise and disturbance therein, and behaved and conducted herself in a rude, quarrelsome, and uncivil manner there, and disturbed and disquieted the defendant and his family in the peaceable occupation and enjoyment of his house, whereupon the defendant requested her to cease from making such noise and disturbance, and to depart out of his said house, which she refused to do; whereupon the defendant, in defence of the possession of his house, gently laid his hands upon her and gently pushed her, in order to remove her, and did then and there remove her from his said house, as he lawfully might for the cause aforesaid, which are the same supposed trespasses, &c. Replication, *de injuriâ*.

At the trial before *Bosanquet, J.*, at the last Spring Assizes for Cheshire, it appeared that the plaintiff Oakes, being in the defendant's public-house at Stockport, lost some rabbits out of a basket which he had brought in with him. His wife came to the house and desired him to go home with her, but he refused to go until he had found

Trespass for assaulting the plaintiff, and with the defendant's hands and with a truncheon beating, bruising, wounding, and ill-treating her, and striking her down with the truncheon, whereby her thigh was broken. Pleas—first, not guilty; secondly, as to assaulting, beating, and ill-treating the plaintiff, that the defendant was possessed of a house, and the plaintiff was making a great noise and disturbance therein, whereupon the defendant requested her to cease from making such noise and disturbance, and to leave the house, which she refused; whereupon the defendant, in defence of the possession of his house, gently laid his hands upon her in order to remove her, and did remove her, out of the house. Replication, *de injuriâ*:—*Held*, first, that the special plea

was no justification of the striking and wounding with the truncheon; secondly, that the fact of the noise and disturbance being proved, the *motive and intention* with which the defendant turned the plaintiff out of the house could not be inquired into on the general traverse *de injuriâ*.

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his rabbits. The wife thereupon (according to the statement of the defendant's witnesses) used very gross and abusive language to the defendant and his guests, and a great noise and disturbance arose in the house. There was contradictory evidence as to whether Oakes or the defendant struck the first blow; but after some blows had passed between them, the defendant fetched a constable's staff or truncheon, with which he struck Oakes several times, and also, as was sworn by the plaintiff's witnesses, following the female plaintiff into the lobby of the house, there struck her down by a blow on the head with the truncheon, and in the fall she broke her thigh. The learned Judge, in summing up, told the jury to consider, in the first place, whether the defendant committed the assault; and secondly, whether, if he did strike her, it was for the purpose of putting her out of the house in consequence of the noise she made; for that, in his opinion, if the defendant endeavoured to turn her out of the house, not on account of the disturbance she made, but in consequence of his quarrel with her husband, or on account of the demand for the rabbits, he was not justified on these pleadings. The jury found a verdict for the plaintiff, damages 20*l*.

In the following term, *Jervis* obtained a rule nisi for a new trial, on the ground of misdirection; contending that by the replication de injuriâ to this plea, the *motive* of the defendant was not put in issue, but only the *cause* alleged in the plea for the assault—namely, whether the female plaintiff did or did not create such a noise and disturbance in the house as justified the defendant in turning her out: distinguishing the case of *Lucas v. Nockells* (a). In this term,

an s (*Cottingham* with him) shewed cause.—The direction of the learned Judge was right. The replica-

(a) 2 Y. & J. 304; 4 Bing. 729; M. & Scott, 650; 7 Begg, N. S. 1 M. & P. 783; 10 Bing. 157; 3 140; 1 Clark & Fin. 438.

tion de injuriâ did, under the circumstances alleged in this plea, involve, as part of the issue, the fact that the female plaintiff was turned out of the house *by virtue of the excuse alleged for it*. It constitutes no defence to have a good cause for the injury complained of, unless the defendant bonâ fide acts upon it. The replication is, that the defendant committed the trespass *of his own wrong, and without the cause alleged*. In the old pleadings, the replication de injuriâ is generally termed "the general traverse." It puts in issue every thing stated in the plea, which is essential to the defendant's justification. Then, is not the *purpose* with which the act is done a material and traversable part of the plea? The defendant says, "the female plaintiff was making a disturbance in my house, and in consequence I turned her out:" then it became essential for him to shew that he did turn her out in consequence of her making a disturbance—in other words, that that was the real cause of his doing so. The cause alleged is a traversable matter of fact: *Lucas v. Nockells*. [Alderson, B.—This difficulty arises: you first put the defendant to prove the fact of the disturbance, and then say it has nothing to do with the justification. Nobody can doubt that the fact, whether she did make a disturbance or not, is in issue.] The facts alleged in the plea here go to constitute one entire defence, and the defendant must prove the whole. Suppose the landlord of a house assaults a party, not because he is making a noise, but because he has a previous quarrel with him—can he justify the trespass on the wholly different ground that the plaintiff was making a noise? *Lucas v. Nockells* is a binding authority, and goes the whole length of this case. There, as here, the *reason* for doing the act complained of was stated as a matter in excuse, and that reason was held to be traversable. The language of the new assignment in trespass—that the defendant committed the trespasses "for other and different purposes" than those alleged in the plea—shews that the pur-

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pose is a material part of the defence. [*Parke, B.*—The whole difficulty arises from the decision in *Lucas v. Nockells*. If it were not for that case, I should have no difficulty: I should have thought that if the defendant had a justifiable cause for turning the party out, the motive was wholly immaterial: even though he did it in pursuance of an old grudge, it made no difference, so long as he did no more than was necessary to turn her out.] At all events, the plaintiff is entitled to retain his verdict on the general issue; the special plea does not answer the *wounding*. [He was then stopped by the Court.]

Jervis and Welsby, contra.—The present case is distinguishable from *Lucas v. Nockells*. There it was undoubtedly held, that a *virtute cujus*, where it involves matter of fact, is traversable; and therefore that under the replication *de injuriâ absque residuo causæ*, to a plea of justification under a *fieri facias*, the plaintiff, admitting the writ, might nevertheless shew that the seizure was really made by the defendants, not in order to levy under the *fi. fa.* of which they were in possession, but for a wholly different purpose. But there, there was no direct traverse of motive; the question simply was, whether the goods were *bonâ fide* taken in execution under the writ, in fact, or not: and it is observable, that both the arguments of counsel in the court below (a), and the judgment of the learned judges in the House of Lords, carefully abstain from admitting that the motive or intention of the defendants was in issue. Thus *Bosanquet, J.*, says (b), “It may be admitted, that the object and motive with which the process of the law is put in execution are not the subjects of traverse, nor consequently of evidence, under the replication *de injuriâ*. If nothing more be done than is required by the exigency of the writ, the act will be justi-

(a) 4 Bing. 738; 2 Y. & J. 315.

(b) 10 Bing. 165.

fied, whatever be the motive of the party, or the cause which leads him to employ the process of the law." *Littledale, J.*, expressed an opinion (a), that if the goods were once actually taken in execution, the evidence of the act being done for a different purpose or under a different claim, would not be admissible. That learned judge, therefore, proceeds on the ground that the writ was in fact not executed at all. *Bayley, B.*, says (b), "where a *virtute cujus* is a mere inference of law, drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a pure question of fact, it may be traversed." Here the *ratione cujus* is a mere inference of law from the facts previously stated. Some of the learned judges went on the new assignment, and the judgment of the House of Lords (c) eventually proceeded on the same ground. In *Reece v. Taylor* (d), the doctrine contended for on the other side was pushed to its full extent, *Littledale, J.*, laying it down, that under the plea of son assault demesne, the defendant must shew an assault by the plaintiff commensurate with the act complained of by him. But that dictum was overruled in *Penn v. Ward* (e), where it was expressly held, that the replication *de injuriâ* to a plea justifying a battery on the ground that the plaintiff had misbehaved himself as the defendant's apprentice, wherefore he moderately chastised him, put in issue only the fact of the misbehaviour, not the moderateness of the chastisement. *Alderson, B.*, there says, "The plaintiff complains of a battery; the defendant says it was the fruit of a moderate and suitable chastisement, and goes on to assign the cause for which he had a right to inflict it: that cause is, that the plaintiff, being his apprentice, behaved himself im-

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(a) 10 Bing. 182.

(b) *Id.* 193.

(c) 7 Bligh, N. S. 193.

(d) 4 Nev. & M. 470.

(e) 2 C. M. & R. 338.

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properly and disobediently. The plaintiff, by his replication, denies *that cause*, and says the defendant acted, not for the cause he has assigned, but of his own wrong. He puts in issue the cause, not the character, of the chastisement." If *Lucas v. Nockells* be carried to the full extent contended for, a new assignment will hardly ever be necessary. Suppose, in slander, the defendant justified on the ground that the words were true; could the plaintiff, under the replication *de injuriâ*, shew that the defendant did not believe the truth of the words, or that he uttered them in satisfaction of an old grudge? That case is analogous to the present.

Secondly, as to the form of the plea. It professes to justify every thing complained of. The assault, beating, and ill-treating, are justified. [*Parke, B.*—Your plea makes no mention of the wounding and bruising, and does not justify the beating *with the truncheon* at all: no doubt the principal cause of action is left uncovered.]

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

PARKE, B.—[After stating the pleadings, he continued.] It is clear that this plea does not attempt to justify either the blows with the truncheon, or the thrusting the female plaintiff down with the truncheon: consequently, if those facts were proved to the satisfaction of the jury, the plaintiff was entitled to damages for them, upon the plea of not guilty: and on reference to the report, it admits of no doubt that those trespasses were so proved, and that the damages were given for them, as there was not any distinct evidence of any other trespasses; consequently, supposing the learned Judge to have been wrong in his direction to the jury, and that it was not competent, upon the issue *de injuriâ*, &c., to inquire into the nature of in-

tention with which the violence was inflicted by the defendant, and therefore the special plea ought to have been found for the defendant, still the plaintiff would be entitled to his verdict, and to the damages, on the plea of not guilty: and if the plaintiff will consent to allow the verdict to be entered on the special plea for the defendant, no new trial ought to be granted.

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We cannot help thinking that the learned Judge was not right in the opinion he expressed. Before the case of *Lucas v. Nockells*, there could have been no doubt but that, under this general traverse, the only question to be tried would have been, whether the defendant was authorized to lay his hands upon and remove the female plaintiff from the house; that is, whether the house was the defendant's, whether (if it was a public-house) the female plaintiff was behaving herself in the manner described by the plea, was requested to depart, and refused. The defendant's motive for using force to turn her out, whether it was a previous feeling of hostility to her, or from a sudden transport of passion, excited by the blow of the husband, could not have been made matter of inquiry. If more than *necessary* violence had been used on that occasion, it ought to have been the subject of a replication, and would have made a defendant a trespasser ab initio; if the plaintiff was proceeding for an assault committed at a time when the authority given by law did not exist, a new assignment would have been necessary.

The whole difficulty as to the law upon the question arises from the case of *Lucas v. Nockells*, by the decision of which we are bound: and if that case had established the general proposition, that the motive and intention with which an authority given by law was exercised, could have been inquired into on the general replication de injuriâ, we must have held that such course must be pursued in all cases, though it might be at variance with the supposed rules of law existing before. But we do not

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find any such general proposition established, either by the opinion of the majority of the Judges, or the judgment of the House of Lords, so far as can be collected from the report of their Lordships' proceedings. Lord *Wynford* and Mr. Justice *Gaselee* proceed in a great degree upon the *new assignment* in that case (as the Court of Exchequer Chamber had done before), although they also consider that the subsequent disposition of the effects under the writ was in issue. Mr. Baron *Bayley*, Mr. Justice *Littledale*, and Mr. Justice *Bosanquet*, disclaimed proceeding upon the new assignment. My Brother *Bosanquet* thought that the *sale* and levy in satisfaction of the debt were properly in issue, admitting that the object and intention with which the process of the law was put in execution were not the subjects of the traverse. Mr. Justice *Littledale* seems, from some expressions (in 10 Bing. 185), to have been of opinion that motive need not be inquired into, if all, and no more than all, was done, which the law requires to be done, to comply with the exigency of the writ; but whether all *was* done that the law required, he thought was in issue. My Brother *Bayley* does not express any opinion to the contrary, as to motive and intention not being in issue. The case of *Lucas v. Nockells* cannot therefore be considered as an authority for the general proposition, that motive and intention can be the subject of inquiry on the general traverse.

We therefore think that the rule must be discharged, on the terms before mentioned.

Rule discharged accordingly.

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HEDGER v. STEAVENSON.

ASSUMPSIT.—The declaration stated that one Samuel Thompson, on the 10th day of August, 1835, made his promissory note in writing, and thereby promised to pay to the order of the defendant, at Messrs. Barclay, Tritton, and Barclays', London, two months after the date thereof, 99*l.* 18*s.* for value received, which period had at the time of the commencement of this suit elapsed, and then delivered the said note to the defendant, and the defendant then indorsed the said note to the plaintiff, and then promised to pay the same according to the tenor and effect thereof. But the said Messrs. Barclay, Tritton, and Barclays did not, nor did the said Samuel Thompson, nor the defendant or any other person, pay the said note, although the said note was presented at the said Messrs. Barclay, Tritton, and Barclays, on the day when it became due, of which the defendant then had notice. There was also a count upon an account stated.

The defendant pleaded several pleas, and amongst others, that the defendant had not due notice of the nonpayment of the said note in the said first count mentioned, in manner and form as the plaintiff in the above in his said first count in that behalf alleged, and of this, &c.

At the trial before *Parke*, B., at the London Sittings in this term, the plaintiff, in order to prove notice of dishonour, put in a letter from the plaintiff's attorney to the defendant, of which the following is a copy:—

“ London, 30, Broad-street Buildings,
14th October, 1835.

“ Sir—I am desired by Mr. Hedger to give you notice that a promissory note for 99*l.* 18*s.*, payable to your order

A notice of the dishonour of a promissory note was in these words:—“ Sir, I am desired by Mr. H. to give you notice that a promissory note, dated August the 10th, 1835, made by S. T. for 99*l.* 18*s.*, payable to your order two months after date thereof, became due yesterday, and has been returned unpaid. I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post:—*Held*, a sufficient notice of dishonour.

The declaration stated that one S. T. on &c. made his promissory note in writing, and thereby promised to pay to the order of the defendant at Messrs. B., T., and B.'s, London, 99*l.* 18*s.*, two months after date, for value received, which period had, at the time of the

commencement of this suit, elapsed, and then delivered the said note to the defendant, and the defendant then indorsed the said note to the plaintiff, and promised to pay the same according to the tenor and effect thereof; but the said Messrs. B., T., & B. did not, nor did the said S. T., nor the defendant, or any other person, pay the said note, although the said note was presented at Messrs. B., T., & B.'s on the day when it became due, of which the defendant then had notice:—*Held*, on motion in arrest of judgment, that the promise was properly stated, and that the breach was sufficient.

Exch. of Pleas, two months after the date thereof, became due yesterday,
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 and has been returned unpaid, and I have to request
 you will please remit the amount thereof, with 1s. 6d.
 noting, free of postage by return of post.

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I am, &c.,

Jones Spyer."

It was objected by the defendant's counsel that this was not a due notice of dishonour; but the learned Judge overruled the objection, and the plaintiff obtained a verdict.

W. H. Watson, on a former day in this term, obtained a rule to shew cause why the verdict should not be entered for the defendant on the above ground, citing *Boulton v. Welch*, recently decided by the Court of Common Pleas (a). He also obtained a rule to shew cause why the judgment should not be arrested, on the ground that the promise alleged in the declaration, stating that the defendant promised to pay according to the tenor and effect of the note, was not the obligation which the law imposed on the indorser of a bill, but that the obligation was conditional to pay in the event of nonpayment by the maker; and if the promise were properly laid, still that the breach was not proper, as it only alleged a nonpayment on the day the note became due, and did not aver that it had not been paid afterwards.

Humfrey and Hoggins now shewed cause.—This was a sufficient notice of dishonour. It states that the bill had been returned unpaid, and makes a demand of 1s. 6d. for noting, which amounts to saying that the bill had been presented and dishonoured. It is distinguishable from the case of *Boulton v. Welch* in this, that in that case there was no intimation conveyed that the bill had been noted. But if it be not, that decision is not warranted by the cases there cited of *Hartley v. Case* (b), and *Solarte v. Palmer* (c). In

(a) Since reported, 3 Bing. N. C. 688.

(c) 7 Bing. 530; 1 Bing. N. C. 194.

(b) 4 B. & Cr. 339.

Hartley v. Case, the letter only amounted to a notice that an action would be commenced, and did not contain any information that the bill had been dishonoured. The notice there was, "I am desired to apply to you for the payment of the sum of 150*l.* due to myself on a draft drawn by Mr. Case on Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take place." Lord *Tenterden* thought at the trial that it did not apprize the party of the fact of dishonour, but contained a mere demand of payment; and afterwards, on a motion to set aside the nonsuit, he says (a): "There is no precise form of words necessary in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." Here, this notice does shew all that Lord *Tenterden* thought requisite: it describes the bill, and says it has been returned unpaid, and makes a demand for the expenses of noting. In *Solarie v. Palmer* (b), also, the letter amounted to a mere notice from the attorney that he was going to commence an action. [Gurney, B.—It stated neither acceptance, presentment, nor dishonour.] It seems impossible to say that there is any similitude between those cases and the case of *Boulton v. Welch*, where the notice was—"The promissory note for 200*l.*, drawn by Henry Hanley, dated the 18th July last, payable three months after date, and indorsed by you, became due yesterday, and is returned to me unpaid. I therefore give notice thereof, and request you will pay the amount thereof forthwith." The words "returned unpaid" are surely equivalent to saying that payment has been demanded and refused. In *Solarie v. Palmer*, *Tindal, J.*, in delivering the judgment of the Court, says (c): "The notice of dishonour, which is commonly

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(a) 4 B. & C. 340.

(b) 1 Cr. & J. 417.

(c) *Id.* 421.

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substituted in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover, most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted; but it should at least inform the party to whom it is addressed, either in express terms, or by *necessary implication*, that the bill has been dishonoured, and that the holder looks to him for payment." There is a fact here which may distinguish this case from *Boulton v. Welch*, namely, the demand of a sum for noting. But that decision is contrary also to the case of *Grugeon v. Smith*, recently decided by the Court of King's Bench. It was an action tried at Liverpool, before *Patteson, J.*, and the notice of dishonour was—"Your bill, due this day, has been returned with charges, to which we request your immediate attention;" which the learned Judge held to be sufficient. A motion was afterwards made in the King's Bench for a new trial, on the ground that the notice was insufficient, but the Court refused the rule. [*Parke, B.*—We have therefore to choose between two conflicting decisions.] Then as to the motion in arrest of judgment.—First, it was not necessary to allege the promise in the declaration, and therefore that was merely surplusage: secondly, the breach is sufficient, for it alleges in substance that neither Messrs. Barclays nor Thompson did pay according to their liability. The breach contains an averment of nonpayment by each of the parties at the time at which each ought to have paid it, and it states that none of the parties paid when, according to the tenor and effect of the bill, they ought to have paid. At all events, the declaration is sufficient after verdict. On this point they cited 1 Saunders, 227, 8.

W. H. Watson, in support of the rule.—The authorities clearly establish that there must be notice of dishonour, not merely of nonpayment. The term "dishonour"

means presentment to the acceptor and nonpayment by him. It is not sufficient to say that the bill is unpaid. The demand of 1s. 6d. for noting is nothing more than a demand of that which the defendant was not liable to pay. A notice of dishonour is only sent in this country; in others a protest is necessary, and if a protest merely stated that a bill was unpaid, it would be insufficient. By the general law, merchants' bills which are not paid when due must be protested: the statute 9 & 10 Will. 3, c. 17, gives the form of the protest; and the particulars required by that statute to be stated, should appear in a notice of dishonour, which is a mere substitution for a protest: the necessary information must be conveyed in clear and unequivocal terms. In *Hartley v. Case*, it would be perfectly obvious to any person receiving the notice, that the bill had been returned, and that the party was in a situation to take legal proceedings: but that was held not to be a sufficient notice, but that it must contain an intimation that payment of the bill has been refused by the acceptor. There is nothing in this notice to convey an intimation that the bill has been presented to Thompson, or at Messrs. Barclays. It may be that the bill has been returned unpaid, although not presented, or not presented on the day it became due, by which the indorser would be discharged. In *Boulton v. Welch*, Tindal, C. J., says: "In the case of a promissory note, the notice should shew a presentment to the maker, a demand of payment, and refusal. Here, the notice only states that the note became due, and was returned unpaid. These facts are compatible with an entire omission to present the note to the maker." So here, it is perfectly consistent with this notice that the bill has never been presented. The case of *Grugeon v. Smith* is directly at variance with *Solarte v. Palmer*, and perfectly inconsistent with *Boulton v. Welch*; and it should be observed, that it was only decided upon the refusal of a rule, and not upon a full discussion of the matter in argument.

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Secondly, the judgment ought to be arrested. The promise laid in this declaration is not the obligation that the law imposes on the drawer of a bill or the indorser of a note; and though the law would have implied a promise if none had been alleged, yet, if a promise is alleged, and it is more extensive than the obligation which the law raises, it is bad even after verdict. The promise here laid is to pay according to the tenor and effect of the note; but the defendant by indorsing this note made no such promise, but only to pay after presentment, dishonour, and due notice of dishonour. The promise laid is an absolute promise to pay, whereas the obligation is conditional only. But further, there is no proper breach alleged. The breach is, that the said Messrs. Barclays did not, nor did the said S. Thompson, nor the defendant or any other person, pay the said note, although the said note was presented at Messrs. Barclays' on the day when it became due, of which the defendant had notice. It is that which is contained in the whole sentence, of which it is alleged that he had notice. The meaning is, that he did not pay at that time and place, viz. the day it became due—when the indorser was not liable to pay; and it is consistent with such an allegation that he may have paid it afterwards.

PARKE, B.—I am of opinion that the rule ought to be discharged on both points. The first question, which is one of considerable importance, is, whether there is a sufficient notice of dishonour. The law upon this point is established by the decision in *Solarte v. Palmer*, which confirmed that of *Hartley v. Case*, against the previous opinion of the profession. It is certain, that after the case of *Tindal v. Brown* (a), there was an impression that it was sufficient if the notice conveyed an intimation that the party to whom it was given was looked to for payment of

(a) 1 T. R. 167.

the bill or note. *Hartley v. Case* first made an alteration in the law, and decided that the view so taken was not correct. The rule there laid down by Lord *Tenterden* was, that though no precise form of words was necessary to be used in giving notice of dishonour, yet the language employed must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Upon the authority of that case the Court of Exchequer Chamber and the House of Lords decided *Solarte v. Palmer*, and held the notice there used insufficient. By that decision we are bound, though I am not prepared to say that I am bound by all the reasoning or language of the learned judges in giving their opinion, and therefore should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, "by *express terms or necessary implication*, that the bill was presented and dishonoured;" it seems to me enough if it appear by reasonable intentment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him. However, supposing that we are bound by the precise expression of *Tindal, C. J.*, in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the term "necessary implication;" for were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor. We must not put such a meaning on that expression, as to say that the language of the instrument must be so precise as to exclude the possibility of any other inference than that the bill had been so presented and returned unpaid. On the subject of the term "necessary implication," Lord *Eldon* says—"Necessary implication means not natural necessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed:" *Wilkinson v. Adam* (a).

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If we adopt such a rule of construction in the present case, could any doubt be entertained by any mercantile man who received this notice, that the note had been presented to the maker when due, and was not honoured? Look at the language of the notice—"I am desired to give you notice that a promissory note made by Samuel Thompson for 99*l*. 18*s*., payable to your order, became due yesterday, and has been returned unpaid. I have to request you will remit the amount thereof, with 1*s*. 6*d*. noting." It states the time when the note became due, and that it had been returned unpaid. Can any one doubt the use of the term "returned unpaid?" The word "returned" is almost a technical term in matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid. Upon reading this notice I should say, that it appears from it, by necessary implication, (in the meaning I attach to the term), that the note has been duly presented and dishonoured. This is the opinion which I should have formed previously to the case of *Boulton v. Welch*, and we are not called upon to overrule that case without some authority to the contrary. The notice in *Grageon v. Smith* was in the same terms as the present; and as we must determine to which of the two cases we will subscribe, I must say I think that the one in the Common Pleas was not rightly determined. There is indeed one circumstance mentioned in this notice of dishonour, which does not appear in the notice in *Boulton v. Welch*, viz. that the bill had been noted: that constitutes a distinction between the two cases; but I disclaim to go on that distinction. In *Solarte v. Palmer*, it was contended that there was no intimation that the bill had been presented for payment, or that it was unpaid, or even that it was due, and the argument for the sufficiency of the notice rested on the authority of *Tindal v. Brown*—on its containing sufficient information that the party was held liable to the holder. In the present case I think no mercantile man, upon reading the notice, could possibly misunderstand its meaning; and

therefore on that ground I think the rule to enter a verdict for the defendant ought to be discharged.

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Then, with respect to the other two grounds on which it was contended that the judgment ought to be arrested. First, it was said that there was no proper legal promise alleged in the declaration. It is not in the usual and most correct form; but I cannot say that it is so incorrect a mode of laying the promise as to make it bad, especially after verdict. The declaration states the note to have been drawn by Thompson, payable to the order of the defendant, and delivered to him, and by him indorsed to the plaintiff: and that the defendant promised to pay according to the tenor and effect of the note, that is, of the note so indorsed. That is not an improper description of the liability of the indorser; it means that he will pay the note when due, after presentment and notice of dishonour. The next objection in arrest of judgment was, that there was no sufficient breach. I am of opinion that the breach may be so read as to constitute a good breach, viz. a nonpayment by the indorser after presentment of the note and after nonpayment by the maker, and due notice that it was unpaid. The allegation is, that Messrs. Barclay and Co. did not, nor did the said Thompson, nor the defendant, or any other person, pay the note, although it was presented at Messrs. Barclay and Co.'s on the day when it became due. It does not say that the defendant did not pay when the note was presented, but generally that he did not pay, and imports no more than this, that although presented, neither of the parties paid it at any time. That is a sufficient breach after verdict. As to whether or not it might have been bad on special demurrer, we are not called upon to give an opinion.

BOLLAND, B.—I am of the same opinion on both points. I think we ought not to construe an instrument of this nature too strictly: and provided it contain information

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that the bill has been dishonoured, and that the party by whom it was given is considered liable, that is sufficient. Let us look at the circumstances by which matters of this nature are accompanied. Long acquainted as I have been with mercantile affairs, not only professionally but practically, I for one do not feel inclined to clog these transactions with difficulties, nor will I do so unless I am compelled by the authority of decided cases. Let us look at this case, and see whether any man who had been only a week conversant with business could have doubted that this instrument had been dishonoured, and that he was held liable to pay the amount due upon it. In the first place, it is a *returned* note, an expression which is perfectly understood in the city of London to designate a note which has been dishonoured. Then the notice describes the note, gives the amount, and states it to have been due the day before; goes on to request that the defendant would remit the amount; and adds further, that the writer claims 1s. 6d. for noting, which though he was not entitled to require, it was nevertheless some further information with respect to the note. Considering all the terms of the notice, I think that even the most unpractised man would be perfectly satisfied what had happened to the note.

ALDERSON, B.—I am of the same opinion. The only conclusion to be drawn from the cases of *Hartley v. Cox* and *Solarte v. Palmer* is this, that a notice of dishonour must not merely convey information that the party is held liable, but also that the note or bill has been dishonoured. I agree with my Brother *Parke*, that we are not bound by the strict words of the judges, if the term “necessary implication” is used by them in a strict sense. It must have that reasonable construction which is given in the judgment of Lord *Eldon*, cited by my Brother *Parke*. In that view of the case, the requisites are fully satisfied by

the terms of this notice; the presentment and dishonour are necessarily to be inferred from the words here used.

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GURNEY, B.—I do not think *Boulton v. Welch* is governed by either of the cases of *Hartley v. Case* and *Sollarte v. Palmer*; and we are fortified in our opinion that this notice is sufficient by *Grugeon v. Smith*, in which the terms of the notice were not so strong as in the present case.

PARKE, B.—I may add, that Lord *Abinger*, to whom I mentioned this case, had no doubt of the notice being sufficient.

Rule discharged.

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CASE for distraining upon the plaintiff for the sum of 21*l.* for rent arrear, when 10*l.* 10*s.* only was due. Plea, Not guilty. At the trial before *Williams, J.*, at the last Somersetshire Assizes, the plaintiff, in order to prove the amount of rent due, put in an agreement for a lease dated 8th September, 1835, whereby the defendant agreed to let, and the plaintiff agreed to take, for seven years from that date, a house, which in the agreement was stated to be No. 35, Broad-street, at a yearly rent of 42*l.* per annum, payable quarterly; the first payment to be made on the 25th of March then next following. The distress was made for two quarters' rent, alleged to have accrued due at Lady-day, 1836. The evidence of the distress was, that the broker went to the plaintiff's house, which was payment of rent alleged to be due, and 3*l.* 3*s.* for expenses of the levy, but touched nothing, and made no inventory. The tenant paid him the rent and expenses under protest, on which he withdrew. In an action against the landlord for an excessive distress:—*Held*, that the defendant could not say there had been no actual distress.

By agreement dated 8th September, the defendant agreed to let a house to the plaintiff for seven years, at an annual rent, payable quarterly, the first payment to be made on the 25th March following:—*Held*, that a quarter's rent only became due on the 25th March.

A landlord's broker went to the tenant's house, and pressed for

By an agreement between the plaintiff and defendant, a house, No. 38, was let to the plaintiff. After the agreement was executed and delivered to the plaintiff, it was altered (it was not proved by whom) by writing 35 instead of 38 on an erasure. The house occupied by the plaintiff under the agreement was in fact No. 35:—*Held*, that the altered agreement might be given in evidence in an action for an excessive distress (in which the demise was admitted on the record), to shew the terms of the holding.

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No. 35, and pressed him for payment of the money, but took none of his goods, and made out no inventory; but the plaintiff, by the advice of his attorney, paid 2*l.* for the rent, and 3*l.* 3*s.* for expenses to the broker, under protest, and thereupon the broker withdrew from the premises. It appeared also, that after the execution of the agreement and its delivery to the plaintiff, the number of the house had been altered from 38 to 35, the 5 being written on an erasure over the 8; and the jury found that this was done without the defendant's knowledge. For the defendant, three objections were taken: first, that by virtue of the agreement half a year's rent was due when the distress was made; secondly, that the agreement was void by reason of the alteration; and thirdly, that no actual distress was proved. The learned judge reserved all these points, and the plaintiff had a verdict for 13*l.* 13*s.*

In Easter Term, *Erle* moved, in pursuance of the leave reserved, to enter a nonsuit. First, half a year's rent was due. It was said for the plaintiff, that under the agreement, the first *quarter's* rent only became payable at the Lady-day following; but it is submitted that the intention of the parties was only that the payment of the quarter's rent which would have fallen due at Christmas should be postponed till Lady-day. The only question is, to what period the payment for the lapsed quarter is deferred—whether to the end of the term, or only until the next quarter day? [Lord *Abinger*, C. B.—The first quarterly payment is to be made on the 25th March; therefore the previous quarter's rent is either forgiven altogether, or postponed to the end of the term. *Parke*, B.—The last rent would become due at Christmas 1842. The only consequence is, that the lessor will lose his remedy by distress for that rent; he retains his remedy on the contract.]

Secondly, there was no actual distress; nothing being taken, no person remaining on the premises, and no inven-

tory being made: *Swann v. Lord Falmouth* (a). The defendant did not, in the terms of the declaration, "take and seize" the plaintiff's goods. [*Alderson*, B.—The plaintiff paid the expenses of the levy.] That might form a ground of action for money had and received. [*Lord Abinger*, C. B.—The defendant, by his broker, appears there and says, "Unless you pay me 21*l.* for rent, and three guineas for expenses, I shall take your goods." It does not lie in the defendant's mouth, after receiving the money, to say there was no distress. *Parke*, B.—The plaintiff could not be bound to pay the three guineas unless there had been a distress: then the defendant receives it on the footing of there having been a distress. *Alderson*, B.—It is really no more than an agreement not to go through a mere ceremony.]

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Thirdly, the agreement was void by reason of the alteration in it after it was delivered to the plaintiff. It was a document essential to the proof of the plaintiff's case, since without it he could not prove the real amount of rent due: then the jury have found that it was altered without the defendant's assent. On this point the Court granted a rule nisi; against which

Bompas, Serjt., and *Halcomb*, now shewed cause.—The only question is, whether the deed is absolutely void by this alteration. Now it is clear that the house No. 35 was the one intended by both parties to be leased; the alteration, therefore, carried into effect, instead of defeating, the intention of the parties, and was immaterial under the circumstances: since, if the number 38 had been left in the agreement, and it appeared that No. 35 was the house intended, the latter would equally pass by it. There was no distinct evidence that the instrument was altered *by the plaintiff*; but even if it was, and if the alteration was made merely to correct a mistake, and not *animo cancellandi*,

(a) 8 B. & Cr. 456; 2 Man. & R. 534.

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it would not vitiate the agreement: *Perrott v. Perrott* (a); see also *Bates v. Grabham* (b), *Motteux v. London Assurance Company* (c), *Roe v. Archbishop of York* (d), *Hall v. Chandless* (e), Sugden on Powers, 412, (5th edition). The cases as to alterations in bills of exchange are analogous. Thus, where a bill was dated by mistake in 1622 instead of 1823, and an agent of the drawer and acceptor, employed to hand it over to the indorsee, altered, without their consent, the figure 2 into a 3, the alteration was held immaterial: *Brutt v. Picard* (f). *Kershaw v. Cox* (g), *Jacobs v. Hart* (h), *Cole v. Parkin* (i), are authorities to the like effect. It is very questionable, moreover, whether an alteration made in a material part by a stranger vitiates a deed: 6 Co. 26. b. note; *Jacobs v. Hart*; and here it is not found to have been made by the plaintiff. [*Alderson, B.*—If a deed is executed with blanks, and afterwards filled up, it is void; yet that is carrying out the intention of the parties.] That proceeds on the ground of the technical plea of non est factum—it cannot strictly be said to be the deed of the parties.

But, secondly, assuming that the agreement is void as to pass any interest to the plaintiff, it was admissible in evidence between these parties for the purpose of proving the terms of the tenancy, for which purpose alone it was necessary to use it—the demise itself being admitted on the record, and the only point in issue being what was the amount of rent due: *Doe d. Beanland v. Hirst* (k). The subsequent alteration does not divest the estate; and it is not pretended that there was any alteration as to the terms of the taking. It is not therefore material to consider whether it ought to have been submitted to the jury to

(a) 14 East, 423.

(b) 1 Salk. 444.

(c) 1 Atk. 545.

(d) 6 East, 86.

(e) 4 Bing. 123; 12 Moore, 316.

(f) Ry. & M. 37.

(g) 3 Esp. 346.

(h) 6 M. & Sel. 142.

(i) 12 East, 471.

(k) 3 Stark. 60.

say whether the alteration was made by the plaintiff: otherwise it might be urged, that the defendant ought to have elicited all the circumstances to prove the fraud, and that the jury ought to have found it; it will not be presumed after verdict: *Minet v. Gibson* (a).

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Crowder, contra.—If this ageement had been presented in evidence as it was originally framed, it would have been a deed demising No. 38, whereas the distress was in No. 35; and there was no evidence to shew that there were not other houses which the plaintiff occupied as tenant to the defendant. The only evidence of the contract by which the rent was reserved was this agreement; the plaintiff produces it, he derives a benefit under it, and it is not shewn ever to have been out of his hands: it must be presumed against him, therefore, that the alteration was made with his privity. It is said the alteration was immaterial, being made to correct a mistake. But in *Markham v. Gonaston* (b), a deed was held to be avoided by the insertion of words after its execution, by the obligor's servant, and although it was by his consent and for his benefit; and Fenner, J., there cited a case where an alteration in a lease, as to the amount of rent, made according to the intention of the parties, had the same effect. The same law is laid down in the second resolution in *Pigot's case* (c). The common law doctrine as to the alteration of deeds is thus strict, because otherwise the whole danger of admitting parol evidence to vary written instruments is at once introduced. No mistake in a material part of a deed can be rectified, after its execution, by one party behind the back of the other. None of the cases cited on the other side impugn the doctrine laid down in the older authorities. The cases as to alterations in bills are altogether different; in most of them the question arose on the pro-

(a) 3 T. R. 481.

(b) Cro. Eliz. 626.

(c) 11 Co. 27. a.

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visions of the Stamp Act—whether by the alteration the instrument became a new one, so as to require a fresh stamp. In *Brutt v. Picard* the alteration was made by an agent of both parties before the bill was put into circulation. So in *Kershaw v. Cox*, and *Hall v. Chandless*, all parties agreed to the alteration. [*Alderson, B.*—It is difficult to understand why an alteration by a stranger should in any case avoid the deed—why the tortious act of a third person should affect the rights of the two parties to it, unless the alteration goes the length of making it doubtful what the deed originally was, and what the parties meant. Lord *Abinger, C. B.*—Suppose the stranger destroyed instead of altering it?] In *Rippiner v. Wright* (a), it was held that no parol evidence could be given, even of an unstamped agreement which had been destroyed by the wrongful act of the party who took the objection. The true reason for the doctrine as to the alteration of written instruments is to avoid the temptation to fraud and perjury which would otherwise prevail.

Then, supposing the agreement to be void, was it receivable in evidence? To hold it so, would be to sanction a most dangerous principle—that a deed, intended for the purpose for which it was made, by an act which must be considered wrongful, may be brought into Court and looked at to establish the right of the party out of whose hands it comes in its altered state, and to whom it was delivered unaltered. The instrument is to be void as to the demise of the premises, and yet the rent is to be given in evidence. It is but one step farther to say the plaintiff might give parol evidence, though he has alleged a written demise. The alteration vitiates the instrument *as a whole*: *Master v. Miller* (b), *Tidmarsh v. Grover* (c), *Cowie v. Harrison* (d). Suppose the declaration had alleged a demise of No. 38, and the agreement had been

(a) 2 B. & Ald. 1096.

(b) 4 T. R. 320.

(c) 1 M. & Sel. 735.

(d) 4 B. & Ald. 197.

put in as originally written, and the distress were proved in No. 35, the declaration then would not be supported by the evidence. Again, suppose the declaration alleged a demise of No. 35, would this instrument support that count? It is submitted that no parol testimony could be given to shew it was a mistake, because non constat that the plaintiff might not have an instrument behind, properly applying to No. 35. Parol evidence is admissible only where there is an ambiguity—as if it were doubtful which was the figure, 5 or 8.

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LORD ABINGER, C. B.—I think there is no ground for making the rule absolute: nor do I think, when the case is rightly understood, that the question arises whether an alteration even by the plaintiff ought to avoid the agreement. If it does, the only consequence would be that it would be impossible for him to maintain an action upon as on a demise; but it is quite a different question whether it can be given in evidence. It may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact. The very case cited by Mr. Crowder, of a lessee altering for the benefit of the lessor, illustrates the ground on which our judgment ought to proceed. Though it may be true that he lost the benefit of the term, yet the instrument would be available, even though altered by himself, to shew the amount of bygone rent due for the occupation. I think Mr. Halcomb has put the present case on its true ground. The declaration alleges a tenancy, (which is not denied), and a distress for more rent than was due, which is the point in issue: a distress is proved in No. 35; all the evidence applied to that house, and there is no suggestion that the landlord has demised any other; and to shew the amount of the rent, this agreement is put in. Now, suppose it never to have been altered, and to stand No. 38—the plaintiff might have shewn that the

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defendant had no house No. 38, or any other circumstance to prove that No. 38 was an immaterial part of the description. Suppose the landlord, having but one house in Broad Street, had put a wrong number into the agreement, and had let the party into possession under it—would it not have passed any interest? If the landlord said, “This lease does not apply to the house you occupy,” the tenant would answer, “Yes, I shew that it does: you let me into No. 35, having signed this paper with me: the instrument is binding as to all its other terms.” Again, if No. 35 was the house intended, I am clearly of opinion that parol evidence was receivable to shew that the 38 was a mistake. If there were any suggestion that the defendant had any other house, the case might be different; but we must take the facts to be, that the parties really and bonâ fide intended to let No. 35, and that the whole controversy was about that house. If, then, the plaintiff lost his interest in the term by the alteration, it is nevertheless admissible to shew the terms on which he held No. 35. No case has gone the length of saying that, when a deed is altered, and thereby vitiated, it ceases to be evidence: it may be so with reference to the stamp laws:—there is no occasion, however, in the present case, to raise the general question. The old law was, no doubt, much more strict than it has been in modern times. Originally, there could be no such thing as founding upon a deed without making profert of it; and it was but an invention of the pleaders, growing out of a decision of Lord Mansfield’s, to allege, as an excuse for not making profert, a loss of the deed by time and accident; founded on the presumption to be derived from long possession and enjoyment. I can hardly see how such a course is consistent with the old authorities which say that any alteration, even by a stranger, shall vitiate a deed. If it be so altered as to leave no evidence of what it originally was, that may prevent any party from using it; or if it be

altered in a material part by a party taking a benefit under it, that may prevent *him* even from shewing what it originally was. Here, however, it is sufficient to decide that this agreement was evidence to prove the terms of the holding; and there was no evidence of any other holding than that of the house No. 35.

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BOLLAND, B., concurred.

ALDERSON, B.—This is an agreement, and the rules as to deeds, to which there is a plea of non est factum, are not applicable. Then we are to look to the instrument, to see what was originally the intention of the parties; and if it had remained No. 38, I think it was admissible in evidence.

GURNEY, B., concurred.

Rule discharged.

DAWES v. ANSTRUTHER.

ASSUMPSIT on two bills of exchange for 250*l.* each, dated the 1st June, 1830, drawn by one W. Gordon upon and accepted by the defendant, payable six months after date to the drawer or his order, and by him indorsed to the plaintiff. It appeared that the defendant was arrested on the 17th November last by virtue of a writ of capias, on the copy of which was the following indorsement:—"Bail for 240*l.* and upwards by affidavit." It had also another indorsement, as follows:—"The plaintiff claims 260*l.* 6*s.* 4*d.*, with interest thereon from the 30th December, 1830, to the day of payment, for debt, and 3*l.* 10*s.* for costs, and if the amount thereof is paid to the

In assumpsit by the indorsee against the acceptor of two bills of exchange for 250*l.* each, the writ of capias was indorsed "Bail for 240*l.* and upwards." A declaration was afterwards delivered, containing two counts, one upon each of the bills. The particulars of demand which accompanied the declaration

were as follows: "This action is brought to recover the sum of 260*l.* and upwards, due from the defendant to the plaintiff, upon the several bills of exchange set forth in the first and last counts of the declaration," &c. An order having been made for further and better particulars:—*Held*, on motion to set aside this order, that the defendant was entitled to better particulars: *Alderson, B.*, dissentiente.

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plaintiff or his attornies within four days from the service hereof, further proceedings will be stayed." The sum of 260*l.* was paid into Court in lieu of bail. A declaration was afterwards delivered, which contained two counts, one on each of the bills. The particulars of demand annexed to the declaration were as follows:—"This action is brought to recover the sum of 500*l.* due from the defendant to the plaintiff upon the several bills of exchange set forth in the first and last counts of the declaration, and also interest thereon from the 4th December 1830 to the day of payment." A summons was afterwards taken out before *Gurney, B.*, at chambers, for a further and better account in writing of the particulars of the plaintiff's demand, with dates, for which the action was brought; and the learned Baron having made an order accordingly,

Ogle, on a former day, obtained a rule to shew cause why this order should not be rescinded. The affidavit of *Gordon*, the drawer, stated that the bills were accepted by the defendant for a good and valuable consideration, and that before the bills became due, he the drawer duly indorsed them over to the plaintiff as a collateral security for goods sold and delivered by the plaintiff to him, and upon the express agreement with the plaintiff, that he the plaintiff would account to him for all money recovered upon the bills beyond what should appear due from him to the plaintiff: and that money equal to the whole amount of the said two bills, together with all interest thereon, was still due and owing from the defendant to him the drawer. Against this rule

Theisiger now shewed cause.—In general, particulars of demand are not required in actions on bills of exchange; but under the circumstances of this case the learned judge has properly exercised his discretion in ordering a further and better account in writing of the plaintiff's particulars

of demand, with the dates of the bills, &c. [Lord *Abinger*, C. B.—The general rule is, that particulars are not necessary in actions upon bills of exchange ; but when the party abandons the bill, and goes upon an open account, it is otherwise ; and here the plaintiff himself has volunteered to furnish some particulars.] *Brooks v. Farlar* (a) may be relied upon on the other side ; but there it appeared from the defendant's affidavit, that he was acquainted with the whole of the plaintiff's case. *Tindal*, C. J., there said : “ On a single count for a bill of exchange, the defendant is not entitled to any particulars, unless he makes out a strong case of exception. No such case is made out on these affidavits, from which it appears that within a few shillings the parties are acquainted with each other's case.” But here the defendant does not know for what the plaintiff is going. He holds the defendant to bail for 240*l.* and upwards, and then states that he goes for the sums mentioned in the two counts of the declaration, which claim 500*l.*, the full amount of the two bills, so that it is impossible to know what he is seeking to recover. [*Alderson*, B.—There could be no doubt as to the nature of the demand, because the demand is for the two bills mentioned in the declaration. Perhaps you might have a right to ask the plaintiff for how much he goes.] We want to ask him as to certain goods which he has given as a consideration for these bills. [*Alderson*, B.—You are in fact asking for a bill of discovery ; you had better go into equity for that. It is not common to require anything more than the amount. The declaration shews what the plaintiff goes for, and he has only to add the amount for which he goes, and then the question will arise at chambers as to whether he has not complied with the learned Judge's order. The question is, whether this is not a good bill of particulars ?]

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Ogle, in support of the rule.—The particulars are as full as they can be. The declaration contains two counts, one on each bill, and in which the dates of the bills already appear. It is an action by the indorsee against the acceptor; therefore it is impossible for him to recover except upon the bills. Though the indorsement on the writ is only for 240*l.*, the plaintiff is not prevented by that from going for and recovering at the trial the whole amount of the two bills. There is no rule of Court or case which restrains the plaintiff from recovering a larger sum than is indorsed on the writ. In *Brooks v. Farlar*, it was held that the defendant is not entitled to demand particulars on a count upon a bill of exchange. In that case it was said by *Stephen, Serjt.*, in argument, that the party ought to depose that he does not know for what the plaintiff is suing. There is no such statement in this affidavit.

LORD ABINGER, C. B.—I think this rule ought to be discharged. Suppose this had been an action by Gordon himself, and the defendant had made an application for further particulars, upon affidavit stating that the bills were given to Gordon under an agreement that he should pay some debt of the defendant's; if Gordon does not deny that the bills were merely a security for money paid, although in point of law, in an action on the bills, he might sue for the whole amount, yet in truth he has no right except to the amount which he has paid, and the defendant has a right to know what sum he really claims. It is admitted that these bills were given, not for a debt, but as a security for money advanced. I should think this is a case in which better particulars of the plaintiff's demand ought to be given. It appears from the affidavits that 260*l.* is the whole amount which he claims.

ALDERSON, B.—A bill of particulars is simply this:—where the declaration is so general that you cannot upon

the face of it ascertain what the plaintiff goes for, then the defendant has a right to call upon the plaintiff for a statement of his demand; but I have always understood, as long as I have been acquainted with the law, that where there is a count stating what the demand is, the defendant cannot require particulars, inasmuch as the particular is the declaration itself. I find it so laid down in all the books of practice—particulars of the sum the plaintiff seeks to recover are never required in actions on bills of exchange. It may be an unconscientious thing to demand this 500*l.*; but can any person doubt, if he sees a count upon one bill of exchange for 250*l.* and a count upon another bill of exchange for 250*l.*, and a particular that the plaintiff goes for the amount of the bills in these counts—could any person doubt the distinctness of the demand? whether conscientious or not is another question. I should think these particulars were sufficient.

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BOLLAND, B.—So far I agree with my Brother *Alderson*, that there must be some clear and specific grounds for asking for better particulars in actions on bills of exchange than are here given, and I am not aware, except in one instance, that I ever made such an order. But, in the present case, if the application had been made to me, I should have called upon the plaintiff to square his demand by what he originally endorsed upon the writ, viz. 240*l.* and upwards. If the holder of these bills had a claim for 500*l.*, it is extraordinary he should moderate his claim to 240*l.* The presumption is, that an indorsee would claim the whole amount which he could prove at the trial. The ground upon which I agree with The Lord Chief Baron is this, that the plaintiff has confined himself to a claim of 240*l.* by arresting for that amount only; if he had not done so, the defendant would have been left to a Court of Equity and a bill of discovery. It is clear that Gordon

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put the bills into the plaintiff's hands as a security, and, I think, under the circumstances, that the plaintiff is bound to give particulars of the sum he claims.

GURNEY, B.—I never, in any other case, made an order for better particulars in an action on a bill of exchange; but, under the circumstances of this case, I thought it was not unreasonable to call upon the plaintiff to state more.

Rule discharged.

TINLEY v. PORTER.

In order to ground a motion for an attachment for disobedience to a writ of subpœna ad testificandum, the affidavit must state that the party was a material witness.

IN Easter Term last, *Cresswell* had obtained a rule nisi for an attachment against John Askew for not attending at the trial of a cause at the last Liverpool Assizes, pursuant to a writ of subpœna ad testificandum. The rule was obtained on an affidavit of the service of the subpœna; that a note was sent to the witness the evening before the cause was tried, informing him that the cause was likely to be tried early the following morning, but that, although called upon his subpœna, he did not attend; but it did not state that he was "a material and necessary witness." The affidavit in answer stated that Askew sent his clerk to the Court to wait till the cause was called on, and then to come and inform him of it; that his clerk did so; but that in the meantime he had been obliged to leave his office on his duties as harbour-master, and that he did not return until the cause was tried.

Alexander now shewed cause.—There is the same vice in this affidavit as there was in the affidavit in *Taylor v. Willans* (a), where it was held, that, to render a person liable to an attachment for not attending upon a subpœna,

(a) 4 M. & P. 59.

it is incumbent on the party applying to state that he was a material and necessary witness for him. Unless a clear case of contempt be made out, the Court will not interfere.

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Cresswell, contra.—The witness, having been served with the subpoena, was bound to attend, unless it was intimated to him that he would not be examined. [Lord Abinger, C. B.—You may have another remedy by action.] There are many cases in which an attachment would be granted where no action can be maintained. If it had been shewn that there had been any misconduct, or any abuse of the process of the Court, an attachment would not lie; but if not, the Court will grant an attachment for disobedience to the subpoena. Here there was nothing to shew that the plaintiff did not *bonâ fide* intend to avail himself of Askew's evidence, but the contrary, for a note was sent to him the evening before, informing him that the cause was likely to be tried early the following morning.

LORD ABINGER, C. B.—We must take the case in the Common Pleas as an authority, that where a party seeks to obtain an attachment, the affidavit must state that he was a material witness.

PARKE, B.—We are bound by the decision of the Court of Common Pleas. It appears to me rather a new practice, but as it has been so decided, we must respect that authority.

The rest of the Court concurred.

Rule discharged.

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LEE and Others, on behalf of themselves and the rest of the Proprietors of the Lake Loch Railroad, v. Sir W. M. MILNER, Bart., and Others, Trustees for the Undertakers of the Aire and Calder Navigation.

By the act of Parliament, 9 Geo. 4, c. 98, the undertakers of the Aire and Calder Navigation were empowered to make (among other works) a navigable cut or canal from the river Calder, to communicate with the river at another point, and also to construct a rail-road from such cut to the highway between Leeds and Wakefield; and, for such purposes, to enter upon any lands, &c., making satisfaction as thereafter mentioned; and it was provided, that in case of any disputes or differences between the undertakers and the parties interested in the lands, &c. taken, used, damaged, or affected by the execution of any of the powers of the act, a jury should be summoned in manner therein directed, who should assess and ascertain the sum or sums of money to be paid for the purchase of such lands, &c., and also what other separate and distinct sum or sums of money should be paid by way of recompence, either for the damages which should or might before that time have been sustained as aforesaid, or for the future temporary or perpetual continuance of any recurring damages which should have been occasioned as aforesaid, and the cause or occasion of which should have been only in part obviated or repaired by the undertakers, and which could or would be no further obviated, repaired, or remedied by them. Other clauses provided that the company should agree for, or cause to be valued and paid for, the lands, &c. which they were empowered to purchase, within five years after the passing of the act; that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years.

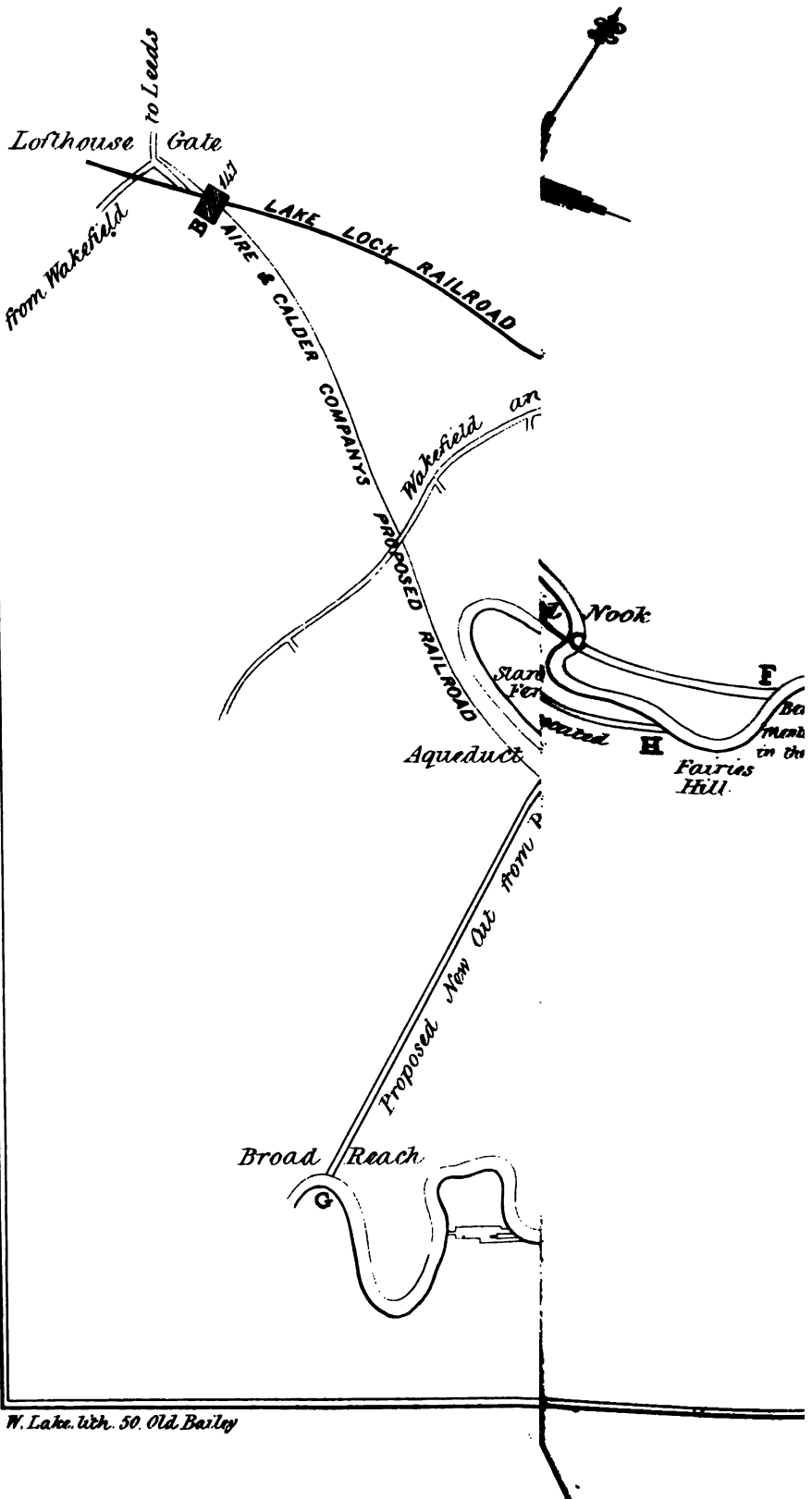
A dispute having arisen as to the value of a piece of land in which the contemplated rail-road crossed the line of an existing rail road, a jury was summoned pursuant to the act, who assessed the value and damages as follows:—Value of the land, 6*l.*; present damages, 0; future damages, 2800*l.* At this time the undertakers had contracted or paid for all the lands required for their works, but had not executed the works between the termini laid down in the parliamentary map, and had deviated above 100 yards from the parliamentary line, and made a cut through land of their own.

Held, first, that that part of the verdict which assessed the future damages was void; for that, in order to enable the jury, under the act of Parliament, to make an assessment of future damages, the cause of injury must already exist in some work of the undertakers already done.

Secondly, that unless the undertakers had *finally abandoned* the intention of making the cut in the parliamentary line, they had a right, at any time within the fifteen years, to take possession of the land in question, on payment or tender of the 6*l.* assessed as its value, and that they had a right to go on simultaneously with the making both of the cut and of the rail-road.

UPON a motion by the defendants, in Trinity Term, 1834, in this Court, to dissolve an injunction awarded and issued against the defendants and the rest of the Undertakers of the navigation of the rivers Aire and Calder, in the West Riding of the county of York, by an order made in this cause bearing date the 8th of February, 1833, whereby the defendants and the rest of the said undertakers, their deputies, agents, servants, and workmen, were restrained from entering upon or taking possession of the piece or parcel of land in the said order mentioned, until the defendants should answer the plaintiffs' bill, and this Court make other order to the contrary, Lord *Lyndhurst*, C. B., after hearing the parties by their counsel,





continued the injunction, in order that the opinion of this Court might be taken upon the following case:—

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Before the year 1803, a number of persons having formed themselves into a private company or partnership, by the name of the Lake Loch Railroad Company, now represented in interest by the plain tiffs and several other persons, made and completed, at their own expense, and principally on land belonging to the company, a railroad, known by the name of the Lake Loch Railroad, extending from certain staiths upon the river Calder, in the West Riding of the county of York, for about three miles in length, towards certain collieries situate at the western extremity of the line.

The plan hereunto annexed (a) shews the Lake Loch Railroad, of which the part crossed by the line thereon at B 147, is made entirely on land belonging to the company; and the same plan shews also the various cuts, canals, ways, and other works, and the several places hereinafter mentioned and referred to. Ever since it was made, the Lake Loch Railroad has been constantly used for the carriage of coals by owners and occupiers of collieries connected therewith by means of other railroads, and has thereby yielded to the company an annual profit from the tolls or dues paid for such carriage, amounting, upon an average, during the last three years, to 700*l.* per annum, after deducting all expenses.

By several acts of Parliament, and particularly by the 10 & 11 Will. 3, c. 19, the 14 Geo. 3, c. 96, the 1 Geo. 4, c. 39, and 9 Geo. 4, c. 98, the undertakers of the rivers Aire and Calder, in the said West Riding, have been authorized, amongst other things, to make the said rivers navigable, and to make certain cuts, canals, and other works, and to improve the said navigation, under the several powers, provisoes, and restrictions in the said several acts mentioned.

(a) See the plan opposite this page.

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By the last of these acts, the 9 Geo. 4, c. 98, the said undertakers were, amongst other things, authorized and empowered at their own costs and charges to make, complete, and maintain a navigable cut or canal from and out of the river Calder, at or near to a place called the Broad Reach, in the township of Stanley-cum-Wrenthorpe, in the parish of Wakefield, to communicate with the said river Calder at or near to a place called Woodnook, in the township of Altofts, in the parish of Normanton; and an aqueduct over the river Calder, at or near to a place called Stanley Ferry, in the said townships of Stanley-cum-Wrenthorpe and Altofts; also a collateral navigable branch or canal from and out of the said last-mentioned cut or canal, at or near to a place called Foxholes, to join and communicate with the river Calder at or near to a place called Foxholes Bight, both in the township of Altofts aforesaid; also a railway or tramroad, with proper works and conveniences for the passage of waggons, carts, and other carriages properly constructed, from the said intended cut from Broad Reach to Woodnook, at or near to Stanley Ferry aforesaid, to communicate with a public highway or turnpike road leading between Leeds and Wakefield, at or near to a place there, called Lofthouse Gate, all in the township of Stanley-cum-Wrenthorpe aforesaid; also a navigable cut or canal, or new course or channel for the said river Calder, from and out of the said river Calder, at or near to Woodnook aforesaid, to join and communicate with the said river at a bend therein in the township of Methley, below a certain place called Fairies' Hill; and to make and do divers other matters and things connected therewith, and with the other works mentioned and referred to in the said act. And for the purposes of the act, or any of them, the said undertakers, their deputies, servants, agents, and workmen, were thereby authorized and empowered to enter into and upon the lands and grounds

of any person or persons, bodies politic, corporate, or collegiate, whomsoever and whatsoever, for the purposes in the act mentioned, doing as little damage as might be in the execution of the several powers thereby granted, and making satisfaction in manner thereafter mentioned to the owners or proprietors of, and all persons interested in, the lands, messuages, buildings, tenements, and hereditaments, weirs, waters, watercourses, brooks or streams respectively, which should be taken or removed, diverted or prejudiced, for all the damages to be by them sustained in or by the execution of all or any of the powers of the said act.

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By the 6th section it is enacted, that the said undertakers, in making the said intended cuts, canals, channels, branches, railways, or tramroads, shall not deviate more than 100 yards of 3 feet each from the course or direction delineated on the map or plan, [which had been, in pursuance of s. 5, deposited with the clerk of the peace for the West Riding.]

By the 20th section it is enacted as follows: "And for settling all differences which may arise between the said undertakers and the several owners of and persons interested in the lands, grounds, messuages, mills, buildings, tenements, hereditaments, streams, brooks, weirs, dams, waters, or watercourses which shall or may be taken, used, stopped up, pulled down, damaged, affected, or prejudiced by the execution of any of the powers hereby granted touching the purchase-money to be paid or recompence to be made to them respectively; be it enacted, that if any body politic, corporate, or collegiate, corporation aggregate or sole, trustee or trustees, tenant for life or in tail, husband or guardian, or any other person or persons so interested as aforesaid, shall differ or shall not agree with the said undertakers as to the amount of such purchase-money, recompence, or other compensation, and such amount cannot be adjusted, settled, and agreed for

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by and between such parties and the said undertakers, or if such parties shall refuse to accept such purchase-money, &c., as shall be offered to them by the said undertakers or their agent, and shall give notice thereof in writing to the said undertakers within fourteen days next after such offer shall have been made, and the party or parties giving such notice shall therein request that the matters in dispute may be submitted to the determination of a jury; or if any body politic, &c., or other person or persons seised or possessed of, or interested in or entitled to, or capacitated to sell any such lands, &c. as aforesaid, shall, for the space of fourteen days next after notice in writing shall have been given to the principal officer of any such body politic, &c., or to such person respectively, or left at the last or usual place of his or her abode, &c., neglect or refuse to treat, or shall not agree with the said undertakers for the sale and conveyance of their respective estates and interests therein, or cannot be found, &c., &c.; [the clause then goes on to provide, in the usual terms, for the summoning, empannelling, &c., of a jury before the justices in sessions, to hear evidence as to the matter in controversy;] and such jury upon their oath shall inquire of, assess, and ascertain the sum or sums of money to be paid for the purchase of such lands, &c., and also what other separate and distinct sum or sums of money shall be paid by way of recompence, either for the damages which shall or may before that time have been sustained as aforesaid, *or for the future temporary or perpetual continuance of any recurring damages which shall have been so occasioned as aforesaid, and the cause or occasion of which shall have been only in part obviated or repaired by the said undertakers, and which can or will be no further obviated, repaired, or remedied by them;* and the said justices shall accordingly give judgment for such purchase-money or recompence as shall be assessed by such jury, which verdict, and the judgment to be thereupon pronounced as afore-

said, shall be binding and conclusive, to all intents and purposes, against all bodies politic, &c., and all other persons whomsoever," &c.

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By the 27th section it is enacted, "That the juries shall award all determinations, judgments, and verdicts which they shall respectively make and give concerning the value of lands, tenements, and hereditaments, separately and distinctly from any damages sustained or to be sustained as aforesaid, and shall distinguish the value set upon lands, tenements, and other hereditaments, and the money assessed or adjudged for such damages as aforesaid, separately and apart from each other."

The 29th section directs "That all verdicts and judgments shall be kept by the clerk of the peace, and be deemed records to all intents and purposes."

By the 40th section it is enacted, "That upon payment or legal tender of such sum or sums of money as shall have been contracted or agreed for between the parties, or assessed by any jury or juries in manner aforesaid, for the purchase of any lands, &c., or as a recompence for the yearly produce or profit, or as a compensation for damages as hereinbefore mentioned, to the proprietor or proprietors of such lands and premises, or such other person or persons as shall be interested therein or entitled to receive such compensation, within one calendar month after the same shall have been so agreed for, determined, or awarded, or if the person or persons so entitled or interested, or any of them, cannot be found, or shall refuse to receive the same, or shall not be able to make a good title to or shall refuse to execute a conveyance or conveyances of the land or premises which shall be required for the purposes of this act, then, upon payment of such sum or sums of money into the Bank of England, for the use of the person or persons so interested or entitled as aforesaid, it shall be lawful for the said undertakers, and their agents, servants, or workmen, immediately or at any time to enter

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upon such lands, tenements, or hereditaments respectively, and then and thereupon the lands, &c., and the fee-simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth become the property of the said undertakers, to and for the purposes of this act, for ever, &c. Provided nevertheless, that before or until such payment or legal tender as aforesaid, it shall not be lawful for the said undertakers, or any person or persons acting by or under their authority, or under the provisions of this act, to dig or cut any land or ground, or to take down or remove or alter any messuage, mill, building, tenement, or other hereditament, for the purpose of making the said cuts, canals, channels, branches, railways, tram-roads, docks, basins, and other works, or any part thereof, without leave or consent in writing of the proprietor or proprietors thereof respectively entitled to such payment; and in case any person or persons shall enter upon any such land, ground, or premises, and commit any such offence, before or until such payment or legal tender shall have been made, each and every such person so offending shall forfeit and pay the sum of 5*l.* for each and every day he shall remain or be on such lands or premises, to the proprietor or proprietors of the lands or premises."

And by the 110th and 111th sections of the last-mentioned act, it was further enacted as follows:—

Section 110—"That if the said undertakers shall not, within the space of five years, to be computed from the passing of this act, agree for or cause to be valued and paid for as in this act is mentioned the lands, tenements, or other hereditaments which they are by this act empowered to purchase (or so much thereof as shall be deemed necessary or proper) for the purposes of making the said intended cuts, &c., and other works hereby authorized, then and thenceforth those powers which are

hereby granted to such undertakers for such purposes only shall cease, determine, and be utterly null and void, save and except with the consent of the owner of such lands, tenements, or hereditaments."

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Section 111—And be it further enacted, "That in case the said intended cuts, &c., and other works, shall not be completed and made navigable and passable, so that boats, barges, waggons, carts, and other carriages properly constructed, may pass along the whole line, within the space of fifteen years from the passing of this act, then from and immediately after the expiration of the said term of fifteen years, all the powers, authorities, and privileges given by this act shall cease and determine, save only and except in respect of so much (if any) of the said cuts, &c., or any of the works hereby authorized to be made, as shall have been completed and made navigable and passable, within the said term of fifteen years."

The undertakers, after the passing of the last-mentioned act, effected purchases, or entered into contracts for the purchase, of all the land required for making the said cut or canal from and out of the river Calder at Broad Reach, to communicate with the said river at Woodnook, and they proceeded to make, and have completed, a part of the said cut or canal, viz. from the point K, eastward to the point A on the plan hereunto annexed.

In the part of the cut or canal which has so been made between the said point K and A, the undertakers have not deviated more than one hundred yards from the course or direction mentioned or referred to in the said act of Parliament, and delineated on the map or plan deposited at the office of the clerk of the peace.

The undertakers having purchased by private contract, and for their own use and as their own property, certain lands lying to east and south-east of the said point A, they have made a cut or canal eastward from the said point A to the point D marked on the plan, and thence conti-

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ning eastward to a place lower down the river Calder than Woodnook, in the plan also described, namely, near Fairies' Hill, at the point H on the same plan; the whole of which last-mentioned cut or canal, from the said point A to the said point H, is made through the land so purchased by the undertakers for their own use, and as their own property, and without reference to or under the powers of the said act of Parliament, 9 Geo. 4, c. 98. Such last-mentioned cut or canal from the point A to the point H passes more than 100 yards of three feet each from the course or direction marked on the said plan; and the undertakers have not made or begun to work that part of the cut or canal which in and by the plan is described as extending from the said point A to Woodnook.

The part of the cut or canal which has been thus made by the undertakers from K to H has been completed with locks, lock-houses, bridges, and other works, and has already been and is now navigated. The collateral navigable branch from it at K, to join the river Calder at Foxholes Bight, has also been made and completed by the undertakers. The said other projected cut or canal, or new source or channel for the river Calder, in the said act mentioned, between C and F on the plan, has not yet been begun.

The above-mentioned projected railway or tram-road, on the plan hereunto annexed, crosses the Lake Loch Railroad at B 147. The undertakers have not yet made it in any part of the line, but they have entered upon, staked, set out, and ascertained such parts thereof as they think necessary for making and completing the said railway or tram-road, and which is in the line or direction delineated and described upon the said plan; and they have purchased and paid for the whole of the said land, except the piece of land in question in this suit and one other piece; the purchase money for which two pieces of land

were paid into this Court on the 2nd day of February, 1833. *Exch. of Pleas, 1837.*

[The case then set out the notice given by the undertakers to the Lake Loch Company of their readiness to treat for the sale of the piece of land numbered 147, and the other notices preliminary to the summoning of a jury to assess the value.]

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In pursuance of such last-mentioned notice, an inquiry, under the 20th section of the said act of the 9 Geo. 4, was had at the January Quarter Sessions, 1833. Upon that inquiry, evidence on both sides having been gone into, and the matters of such evidence, and of the arguments of counsel, having been left by the Court to the consideration of the jury, they the said jury (who, at the instance of the said undertakers, had viewed the locus in quo), gave their verdict as follows, viz.:—

Eight perches of land, value - - -	£6
Present damages - - -	0
Future damages - - -	2800

Immediately upon the said verdict being given in, the counsel for the said undertakers objected to that part of the finding whereby the jury assessed the price of 2800*l.* for future damages; nevertheless, under the supposed authority of the same last-mentioned section of the said act, the justices in quarter sessions pronounced their judgment, and the clerk of the peace afterwards drew up a record thereof in the terms following. [The record was then set out.]

On the 29th of January, 1833, the undertakers caused a notice in writing of that date to be served upon the said John Lee, which is as follows. [This was a notice to deliver an abstract of title to and execute a conveyance of the land, offering payment of the 6*l.* awarded by the jury as the purchase money, and giving notice that the under-

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takers considered the finding as to the 2800*l.* for future damages, to be null and void.]

No abstract of title was furnished, nor was any conveyance executed by the company to the undertakers. On the 2nd of February, 1833, the undertakers paid the said sum of 6*l.*, and no more, into the Bank of England, for the use of the company. On the 8th of February, 1833, the company filed their bill on the equity side of this Court, and on the same day obtained, *ex parte*, an injunction to restrain the undertakers from entering upon the said land until they had answered the said bill, and this Court had made other order to the contrary.

The questions submitted for the opinion of the Court are the following, *viz.* :—

1. Whether the defendants have now power to enter on 147, supposing them not to have any intention to complete the cut from Broad Reach to Woodnook, in the line described in the Parliamentary plan?

2. Whether they have now such power, supposing them *bonâ fide* to intend to make and complete the said cut?

3. If the Court should be of opinion that they have now such power, then whether they will have such power after they shall have completed the said cut, supposing them to complete the same within fifteen years from the passing of the said act?

4. Whether the defendants can take the land marked 147 on the plan, without paying or tendering the sum of 2800*l.* assessed by the jury as future damages.

Starkie, for the plaintiffs.—1. The cases of *Blakemore v. The Glamorganshire Canal Company (a)*, and *Rex v. Cumberworth (b)*, are authorities to shew that, in the case assumed by the first question, the defendants have no

(a) 1 Myl. & K. 154.

(b) 3 B. & Ad. 108; and see

the same case on a second discussion, 1 Nev. & P. 197.

power to enter on the land in dispute. The act of Parliament is in the nature of a private bargain between the undertakers and the public, and they are invested with the powers contained in it only on the faith of their completing the works throughout according to the parliamentary line. [Lord *Abinger*, C. B.—How is it to be assumed that they have finally given up the intention of making the cut from Broad Reach to Woodnook? *Alderson*, B.—It is difficult to see how their change of intention, within ten years after the passing of the act, can affect the case. Suppose they intended at present to make the cut in the prescribed line—what security is that to the plaintiffs? they may change their intention to-morrow.] At all events, the five years having elapsed, they cannot take the land without first paying the price.

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2. The next question is, whether, supposing their intention to be to complete the cut in the parliamentary line, they have power to enter on the land. The principle applicable to these cases is thus laid down by Lord *Eldon* in *Blakemore v. The Glamorganshire Canal Company*: “I apprehend those who come for these acts to Parliament, do in effect undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else: that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals.” The undertakers cannot use the powers of the act for a different purpose than those contemplated by it; they cannot therefore make a railroad to communicate with a different line of canal than that stated by the act, and they cannot take the plaintiff’s land for such a purpose.

3. Nor will they have such power even when the cut has been completed. The act requires that the compensation money be paid within a month; that period has

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passed by, and the judgment of the sessions is declared to be final and conclusive. But,

4. It will be said that the jury could assess damages only for existing or for recurring injuries. But it is submitted that it was intended to give compensation for all damage, present and future, which could be estimated: and that at the time of the assessment the damages were to be assessed prospectively, whatever the nature of the damage, and whether damage of that kind had previously occurred or not. It is clear that it was in the contemplation of the act to assess some future damage, and that such prospective damage is to be estimated at the time when the value of the land is assessed. There can be no damage occurring before entry. [*Parke, B.*—There may be damage done to that particular land collaterally, by other works of the canal, which would come within the words of the clause.] It might be a question whether that ought not to be assessed previously, if it were so; but that clearly is not the case within the contemplation of the statute. This compensation clause differs from most such clauses in its terms, and the words are undoubtedly ambiguous. But if there is to be an assessment of damage toties quoties, it will be a very inconvenient course. And if it is to apply only to damage of a class which has once occurred, it will make the whole clause subject to the term “*recurring damages*,” and so exclude damage which is of a perpetual nature, as of a watercourse permanently stopped.—He referred to *Rex v. Leeds and Selby Railway Company* (a), and *In re London and Greenwich Railway Company* (b), in both of which cases the words were, “for the future temporary or perpetual or for any recurring damages,” &c.

Wightman, contra.—With regard to the last question, which is the most important.—It will be a most inconve-

(a) 3 Ad. & E. 683; 5 Nev. & Man. 246.

(b) 2 Ad. & E. 678; 4 Nev. & M. 450.

nient course to assess future damages speculatively. It is stated in the case that the value of the Lake Loch Railway is 700*l.*, and the jury have given four times that amount for contingent future damage. [*Alderson, B.*—Suppose you never make your railway, what will be the damage then?] None whatever. It follows therefore that there must be some point already ascertained, whence the jury may start. There are cases in which they can estimate the recurring injury with the greatest facility. The clause refers to other damages besides those arising from the entry on the land—incidental injuries by the carrying on of the works; and it must be a recurring damage which either *has been* only partially obviated, or cannot be obviated at all. The words clearly refer to damage of a nature which *has been* occasioned by the progress of the works, and must of necessity recur perpetually or temporarily—as the stopping of a watercourse may.

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With regard to the other parts of the case, the question is, whether, according to the decision in *Rex v. Cumberworth*, supposing the company should not complete the parliamentary line at all, in some small portion of it, they would have any power to take the land for the rail-road. The undertakers, however, disclaim any intention to deviate from the parliamentary line; and the second and third questions assume that they *bonâ fide* intend to complete it. Whether they could take the land, supposing the fifteen years had elapsed, and they had not entered, (although they had contracted for it), nor had completed the parliamentary line, is another question. The point here is, whether they are to wait until they have made the canal, before they can take the land for the rail-road. [*Parke, B.*—And the parties through whose land the canal goes may say the same: so neither might ever be finished.] It is clear, therefore, that the works may proceed simultaneously.

Starkie was heard in reply.

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LORD ABINGER, C. B.—With regard to the first question submitted for our consideration, if it had appeared to be admitted on the face of the answer put in by the defendants to the bill for the injunction, that they had abandoned the intention of completing the cut from Broad Reach to Woodnook in the parliamentary line, I should have been disposed to think that a good reason for continuing the injunction, because I think they have no right to take the land except for the specific purposes described in the act. As it is, however, this question appears to be purely a speculative one, and there is no occasion that we should make any observation on it at all. With regard to the second and third questions, which assume a present intention on the part of the undertakers to comply with the act, I think we must answer them in favour of the defendants. It appears to me that they have a right to go on simultaneously with the different works. They have in the first place five years within which to take the land, and they need not commence their works until after that period; and perhaps it may be expedient for them to ascertain the price of all the land they may require for their several works, and to get possession of the whole, before they begin their operations on any part of it.

The last question is that of the greatest importance, and upon that I think that the verdict in respect of these contingent and imaginary damages, which may never occur at all, is a mere nullity. I think the true construction of the act is, that the "recurring damages" must be taken to mean damages ejusdem generis with those which have already arisen; it being open to a party, when a new description of damage ensues, to have a new remedy, either by action, or, if the act justifies it, by a jury summoned pursuant to the act of Parliament. In the latter case, if, when the company commence their operations (the land having previously been valued and paid for), their tram-road shall be found to do damage to the adjoining lands of the Lake Loch

Company, or in the making of it they shall obstruct the passage on the Lake Loch road, or continually obstruct the cross roads, so as to prevent the traffic upon them, then the parties so damaged may apply for compensation under that particular head, and obtain it. But in this case the jury have found no damage yet sustained: how then can they find a verdict for contingent damages, which may never occur at all? As, for example, what would be the case if the company were not to make the tram-road, but, having taken and paid for the land, were to leave it in its present condition for ever? It seems to me that such a verdict is a nullity, and that no action would be maintainable upon it. If that be so, then I think that in a court of equity the Judge would be guided by the same considerations, and would not consider the verdict as standing in the way of the company's operations, nor compel them to pay the money awarded before proceeding with their works.

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PARKE, B.—I am of the same opinion with my Lord Chief Baron. With respect to the first question, if it be assumed that the Aire and Calder undertakers have abandoned all intention of completing their cut according to the parliamentary line, then I should answer that they cannot go upon the piece of land numbered 147, because I conceive they have entered into a bargain with the public, and that they have a right of making the railroad communicating with the cut, only upon the faith of their complying with that parliamentary bargain. That is the rule laid down by Lord *Eldon* in *Blakemore v. The Glamorganshire Canal Company*, and still more strongly by the Court of King's Bench in the case of *Rees v. Cumberworth*. Looking at the terms of this act of Parliament, it seems to me that we are bound to follow the rule as it is laid down by Lord *Eldon*; and therefore I think it is a condition precedent to the exercise of the powers given by the

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act, that the proprietors make that line which they have stipulated for: and they have no right to deviate from it as they have done, even although they make a diversion on their own land, such a diversion not being provided for in the act of Parliament. The powers granted to them for making a rail-road to communicate with the parliamentary line, are granted on the faith of their giving the public the benefit of the navigation along that line. That is the opinion I have formed in this case, provided it is clearly made out that the Company have abandoned the intention of completing the parliamentary line. If they have not abandoned it, or if they choose to resume it, then they have now a right to enter upon all such lands as they have bargained for within the five years, for the purpose of completing the parliamentary line. They have now a power to abandon their original intention of deviation, and may enter on the land contracted for, on payment of such sum for the value of it as they ought to pay in pursuance of the finding of the jury. And I am of opinion also that they have such power before they have completed the line of the canal extending from one terminus to the other. They have a power to go on with all their works at the same time.

What I have said answers the first three inquiries that were submitted to the consideration of the Court. With regard to the fourth, which is the most important inquiry, I concur in opinion with the Lord Chief Baron in the construction he has put upon the clause of the act of Parliament which relates to this part of the case. The act is undoubtedly very obscurely worded, and the obscurity is increased in no small degree by the section which prohibits the undertakers from entering upon the land till they have paid for it. However, looking at the clause in question, it seems to me that the jury have no right to assess prospective damages, except after (if I may so say) an *example* of damage has already occurred; that is in ac-

cordance with the language of the section, and I think it would be impossible for the jury fairly to perform their duty without having such an example to go by. The undertakers have a right either to treat with the parties interested in the lands, or to go before a jury. Then the provision respecting the jury is this—that “they shall inquire of, assess, and ascertain the sum or sums of money to be paid for the purchase of such lands, grounds, &c.; and also what other separate and distinct sum or sums of money shall be paid by way of recompence, either for the damages which shall or may before that time have been sustained as aforesaid,” i. e., which shall or may before that time have been sustained by the execution of any of the powers thereby granted—that is, something that is actually done, something that is completed—but not only for that, but also “for the future temporary or perpetual continuance of any recurring damage which shall have been so occasioned as aforesaid,” i. e., the cause of which shall exist in the execution of the powers of the act. The cause of the damage must therefore have existed in something more or less done or completed by the Company; and there is a further limitation to cases where the cause or occasion shall have been only in part obviated or repaired by the undertakers—for that must be the fair reading of the clause—and “which can or will be no further obviated, repaired, or remedied by them.” The cause of injury, therefore, must exist in some work of the company which is already then done, and that work must be in such a state as to be incapable of further alteration so as to obviate the damage. That being the case, and there being a *permanent subsisting cause*, and the work being incapable of beneficial alteration, so as to prevent mischief to others, then, and then only, have the jury the power of computing the future damage. That is fair and reasonable; there is a permanent cause; they know how often the injury may accrue, and what it is at present;

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and from these data they have the power of making a contingent assessment of damages. I would put as an example, the case of *leakage* through the banks of the canal, or the interruption of some watercourse; the effect of which you can collect from a by-gone time, so as to afford some proper estimate with regard to future time. And it is in that case only, as it seems to me, that there is power to assess future damages. In the present case, the jury expressly find that there is no injury already committed, and therefore there is nothing in respect of which they can assess future damages; and their finding seems to me to be totally void as to that part, though it is good for 6*l.*, the value set upon the land itself. Whenever the Lake Loch Company do receive any actual injury from the works of the undertakers, by the interruption of their trams from moving along the road, and so often as they receive any injury, they will have a right to call upon a jury to make a compensation to them.

BOLLAND, B., concurred.

ALDERSON, B.—I am of the same opinion. I do not give any decided opinion upon the first question in the case, because I am not prepared to say that the company are precluded from taking possession of the land, unless they have *finally abandoned* the making of the canal in the line described by the act of Parliament, seeing that they have by the act the term of fifteen years during which they are to make it. The case of *Blakemore v. The Glamorganshire Canal Company* was totally different, I apprehend, from the present. There the time for making the works had long elapsed when Lord *Eldon* delivered his judgment; and the question was, whether, that being so, and the company preparing to make new works, not authorized by the act of Parliament, but which were prejudicial to Mr. Blakemore, the Court was authorized to

grant an injunction against the company to restrain them from making those works. It was held, and, as it seems to me, on the soundest principle, that these are mere parliamentary bargains between the one party and the other, and the power of making the works is to be restricted to a given specific time; and the moment that time has elapsed without the powers given by the act having been exercised, the parties against whom those powers are to be exercised have a right to prevent their being in future exercised, by injunction of the Court of Chancery. But I apprehend, that, unless it were found in this case that the undertakers had finally abandoned the intention of making the canal from one terminus to the other, it would not be competent to us to say that the Court of Equity ought to grant an injunction against them to prevent their taking possession of land in the intermediate part. With respect to the other points in the case, I take it to be quite clear that the parties are at liberty to make the railway and the canal contemporaneously; otherwise this absurdity would follow,—that it would be A. waiting for B., and B. waiting for A.; inasmuch as the canal is just as much a condition precedent to the railway, as the railway to the canal: it would then be impossible to take possession of the land for making the canal until the railway was made, and impossible to take possession of the land for making the railway until the canal was made; which is so gross an absurdity, that it is clear the works must have been intended to go on contemporaneously, and the parties are not to be precluded from taking the land for the railway until they have completed the canal. With respect to the compensation for damages, which is really the material question in the case, I think, that, after the jury had found that no damage existed at the time they were summoned to assess the compensation for it, it conclusively follows that they cannot assess any future damages, because they are precluded from considering the question of future damages

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until they have ascertained the existence of present damages. I agree, therefore, that that part of the verdict is altogether void, and that the company have a right to enter, on tendering, as they have tendered, the 6*l*. for the land. I think, also, that, if there shall be damage incurred in future, by the separation of the land, and by taking the railway across it, these parties will have a clear right to come before a jury, not only for present, but for future damages, if they can make them out.

FARR v. WARD.

The defendant having purchased cattle from the plaintiff, accepted a bill in payment, with a blank for the name of the drawer, and remitted it by post to the plaintiff. This bill subsequently came into the hands of B. and S. for a valuable consideration. The plaintiff denying that he had ever authorized payment by an acceptance, or that he had ever received the bill or indorsed it, brought an action against the defendant for the price of the cattle. B. and S. also threatened to commence an action against him upon the bill:—*Held,*

THIS was a rule which had been obtained under the first section of the Interpleader Act, under the following circumstances. The defendant, having purchased cattle from the plaintiff, accepted a bill in payment, which he remitted by post to the plaintiff, leaving a blank for the name of the drawer. It appeared that some time afterwards this bill, purporting to be drawn and indorsed by the plaintiff, came for a valuable consideration into the hands of Messrs. Bromage & Sneyd, who were bankers. The plaintiff applied for the price of the cattle, alleging that he had given no authority to the defendant to pay by an acceptance—that his signature as drawer and indorser was a forgery—that he never had received the bill, and had had no transaction with Messrs. Bromage & Sneyd. He afterwards commenced an action for the price of the cattle, and the bankers on the other hand threatened to commence an action on the bill. *White* having obtained a rule on behalf of the defendant, under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 1, calling on the above parties to appear and state their claims before the Court, and abide such order as the Court should make touching their respective claims,

that the defendant was not entitled to relief under the first section of the Interpleader Act.

Evans now appeared for Messrs. Bromage & Sneyd.— *Exch. of Pleas, 1837.*
 The Court has no jurisdiction, under these circumstances, to interfere under the Interpleader Act. The title of the act is, "An Act to enable Courts of Law to give relief against adverse claims made upon persons having no interest in the subject of such claims." Now here the defendant has the greatest possible interest in this claim, as he is liable on the acceptance to the bonâ fide holders of the bill. The act was intended to apply to a mere stakeholder, and not to a party like to the present defendant, who is here merely sued for a debt which he owes. [*Parke, B.*—The defendant can have no difficulty in paying the money to Messrs. Bromage & Sneyd.] In *Brad-dick v. Smith (a)*, it was held that the act did not apply to a case where the defendant had a legal claim.

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E. V. Williams, for the plaintiff.—There is no pretence for saying that the plaintiff has no right to go on with the action, for the debt is still due to him. [*Parke, B.*—The defendant may be bound to pay both you and Messrs. Bromage & Sneyd.] The plaintiff has an unanswerable cause of action.

G. T. White, in support of the rule.—The defendant is in the situation of a party who has no interest in the subject-matter claimed. If Messrs. Bromage & Sneyd have any claim, it is on the indorsement of Farr, either by himself or his agent. [*Parke, B.*—It is said that this indorsement is a forgery; and, if so, they have a right of action against you.] It is submitted that the defendant has a good defence to such an action. [*Parke, B.*—Yes, provided the bill has passed through the hands of Farr. You are in the situation to be liable to two different parties, which is from your own act. What is the form

(a) 2 M. & Scott, 131; 9 Bing. 84.

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of the issue you wish to try?] Whether the bill was indorsed by the plaintiff; for, if it was, then he has been paid for the cattle by this bill. [*Parke, B.*—But, if it should turn out to be a forgery, would you not still be liable to a bonâ holder of the bill?] It was recently laid down by the Court of Common Pleas, in *Johnson v. Widdle (a)*, as a general rule, that no title can be gained through a forgery.

PARKE, B.—No doubt that is true, generally speaking; but here you have sent a bill into the world in blank, and the acceptance admits the handwriting of the drawer. I do not say that it is so; but there may be great doubt whether Messrs. Bromage & Sneyd may not sue on this bill notwithstanding the forgery, and whether the defendant would not be estopped by his acceptance from disputing the genuineness of the drawer's signature. If the defendant is liable to Messrs. Bromage & Sneyd, it does not at all follow that he is not liable to the plaintiff. If it should turn out that Messrs. Bromage & Sneyd were holders of the bill by the indorsement of the plaintiff, it would settle the case one way, but not the other.

ALDERSON, B.—You do not shew that there are cross claims on one and the same subject matter. Your answer to the one claimant is, that the signature of the drawer is a forgery: your answer to the other arises out of the sale of the cattle, and that you paid for them by a bill. How do you satisfy us that you cannot in any case be liable to both parties? If you *may* be so liable, that takes away our jurisdiction. You had better try first whether you are not liable to the plaintiff.

Rule discharged, with costs.

(a) 3 Bing. N. C. 225; 3 Scott, 603.

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EVANS v. CHESTER.

ON a former day, *Dowling* had obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody. It appeared from the affidavits upon which the rule was obtained, that the action was commenced in June, 1836, when the defendant was sole and unmarried; that, between the service of the writ and the declaration, she had married Chester; that the plaintiff proceeded to final judgment, and took her in execution upon a writ of *capias ad satisfaciendum*. The affidavit further stated that there was no settlement made upon the marriage.

An action was commenced against a defendant whilst she was a feme sole; but after service of the writ, and before declaration, she married. The plaintiff proceeded to final judgment, and took her in execution. On motion to discharge her out of custody, the affidavit stated the above facts, and also that no settlement was made upon the marriage; but it did not state that she had no separate property:—*Held*, that the affidavit was insufficient, and that she was not entitled to be discharged.

W. H. Watson shewed cause.—The defendant is not entitled to be discharged. If execution could not be sued out against her, it could not be issued against any one, as the husband was no party to the action. In *Cooper v. Hunchin (a)*, it was held, that, where, after interlocutory judgment against a feme sole upon a contract, she marries, the plaintiff may yet proceed to judgment and execution against her, without joining the husband by *scire facias*. The affidavit also is defective, for it does not state that she had no separate property.

Dowling was heard in support of the rule.

PARKE, B.—The husband may bring a writ of error. If the action had been against both, and execution had issued against both, upon your affidavit she would not be entitled to her discharge, since it does not state that she has no separate property, but only that there was no settlement on the marriage. She might have had property by de-

(a) 4 East, 520.

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vise. The affidavit is defective, and the rule must be discharged with costs.

BOLLAND, B., ALDERSON, B., and GURNEY, B., concurred.

Rule discharged.

WARNE v. BERESFORD.

To a declaration for goods sold, the defendant pleaded, according to the 23 Geo. 2, c. 27, s. 8, (Westminster Court of Requests Act), that the defendant was indebted in a less sum than 40s., and that he was an inhabitant and resident within the city of Westminster. Replication, that the defendant was indebted in the sum of 40s. At the trial the jury found for the defendant. The statute 23 Geo. 2, c. 27, was repealed by 6 & 7 Will. 4, c. 137, after plea pleaded, and before trial:—*Held*, that the plaintiff was entitled to judgment non obstante veredicto.

DECLARATION for goods sold. Plea (which was filed on the 29th of November, 1835), that the defendant was indebted in a less sum than 40s., and at the commencement of the suit was an inhabitant and resident within the city and liberty of Westminster, &c., in the form pointed out by the Westminster Court of Requests Act, 23 Geo. 2, c. 27, s. 8. The plaintiff replied that the defendant was indebted in the sum of 40s.; and upon the trial of this issue a verdict was found for the defendant. After plea pleaded, but before the trial, the statute 23 Geo. 2, c. 27 was repealed by the 6 & 7 Will. 4, c. 137, s. 86, and the sum of 5*l.* was substituted for the former sum of 40s., no provision being made for the case of actions then pending. A rule having on a former day been obtained to enter up judgment for the plaintiff non obstante veredicto—

Payne shewed cause.—The plea being good at the time when it was pleaded, a subsequent repeal of the statute cannot affect it. It tenders a material issue, and that issue is well taken. In *Charrington v. Meatheringham* (a), an application was made for treble costs on a nonsuit, under a statute which was repealed after the nonsuit, but before judgment signed; and there Lord Abinger, C. B., drew a distinction between a penalty and a protection given by a

(a) Ante, 228.

repealed statute, intimating that the latter might remain though the former were taken away. It is for the same reason that a party is not allowed to enter a suggestion upon a statute which has been repealed.

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ALDERSON, B.—The issue here is on the amount only; it is in the nature of a suggestion, and brings this case within those which you say have already been decided. But the question is, upon the facts found on this record, what must be the judgment of the Court, according to the law now in existence. The rule must be made absolute.

BOLLAND, B., and GURNEY, B., concurred.

Rule absolute.

FOULKES v. BURGESS.

THE plaintiff declared against the defendant, a prisoner, in Hilary Term last. The cause was tried at the Assizes on the 31st of March, and final judgment was signed in Easter Term. The defendant not having been charged in execution during that Term, *R. V. Richards*, on a former day in this term, obtained a rule to shew cause why the defendant should not be discharged out of custody, on the ground that, according to the Rule H. T. 2 Will. 4, s. 85, it was now too late for the plaintiff to charge him in execution. That rule provides, "That the plaintiff shall proceed to trial or final judgment against a prisoner within three terms inclusive after declaration, and shall cause the defendant to be charged in execution within two terms after such trial or judgment; of which the term *in or after* which the trial was had shall be reckoned one."

Where the plaintiff declared against a prisoner in Hilary Term, and the cause was tried in the Vacation after, and final judgment was signed in Easter Term:—*Held*, that by the Rule H. T., 2 Will. 4, s. 85, the plaintiff ought to have charged the defendant in execution in Easter Term; and not having done so, that the defendant was entitled to be discharged out of custody.

Barstow shewed cause.—It is admitted that the latter part of the rule, if taken literally, will support this appli-

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cation; but the latter part ought to be read together with the former part, which allows the plaintiff three terms in which to proceed to final judgment. He is also entitled, on the construction of this rule, to three terms before he proceeds to trial; but in that case the term in or after which the trial was had must be reckoned as one for the purpose of execution. [*Gurney, B.*, referred to *Borer v. Baker (a)*.]

ALDERSON, B.—Unless the words of the latter part of the rule have no meaning, the plaintiff ought to have charged the defendant in execution some time in Easter Term.

Rule absolute.

(a) 1 Ad. & E. 860; 2 Dowl. P. C. 608.

CAPEL v. STAINES.

An attorney will not be allowed, on taxation of costs, a charge for more than one letter before action brought, under any circumstances.

DAVISON moved for a rule to shew cause why the Master should not review his taxation, and allow the plaintiff's attorney his charges and costs for a correspondence he had had with the defendant before action brought. It appeared that the defendant had made an earnest request to have time given him, and wrote to the plaintiff's attorney for that purpose, and that in the course of the correspondence the plaintiff's attorney had written fifteen letters, giving time to the defendant, and had paid the postage of thirteen of the defendant's letters.

LORD ABINGER.—C. B.—The practice has been to allow for one letter, and one letter only, before action brought; and that practice ought not to be departed from. If more were allowed, it might lead to great inconvenience.

Rule refused.

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SMITH v. BROWN.

CASE.—The declaration alleged that the defendant was a carrier from Birmingham to Bristol, and that the plaintiff had delivered certain casks to the defendant at Birmingham, to be by him carried and conveyed from Birmingham to Bristol, and there delivered to the plaintiff, for certain hire and reward therefore payable by the plaintiff to the defendant in that behalf. It then alleged as a breach, that, although the time for the delivery of the said casks had long since elapsed, yet the defendant so carelessly behaved and conducted himself in that behalf, that, by and through his carelessness, negligence, and improper conduct, the said casks were not delivered to the plaintiff at Bristol or elsewhere. Pleas, first, not guilty; secondly, that, although true it is that the said casks were delivered to the defendant, being such carrier, to be by him conveyed from Birmingham to Bristol, yet that the same were not delivered to the defendant to be delivered to the plaintiff at Bristol, modo et formâ. The cause was tried, by consent, before the under-sheriff of Bristol, on the 17th of April last, when the jury found a verdict for the plaintiff on the first issue, damages 12*l.* 17*s.* 5*d.*, costs 40*s.*; and for the defendant on the second issue. The under-sheriff delivered the postea to the plaintiff, who signed judgment for the damages. *Addison*, on a former day, obtained a rule to shew cause why this judgment should not be set aside for irregularity, with costs, and why the Master or the plaintiff's then attorney or agent should not deliver up to the defendant the writ of trial, with the sheriff's indorsement thereon, upon the ground that the defendant having obtained a verdict upon the second plea, which went to the whole declaration, the plaintiffs were not entitled to have the postea delivered up to them, or to sign judgment. Against this rule,

Where an action for a tort was, by consent, tried before the under-sheriff, and the jury found a verdict for the plaintiff on one issue, and for the defendant on another:—
Held, that neither party was entitled to sign judgment, as the trial was altogether a nullity.

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Ball now shewed cause.—The plaintiffs having recovered a verdict and damages upon the general issue, were entitled to have the postea delivered to them. But, if not, the Court has no power to order the postea to be delivered up to the defendant. The sheriff had no authority to try the cause, the Writ of Trial Act, 3 & 4 Will. 4, c. 42, not applying to actions of tort, but only to debts and pecuniary demands—*Watson v. Abbott* (a); therefore the trial was altogether a nullity. It makes no difference that the case was tried by consent.

Addison, *contra*—The jury having found one plea, which went to the whole declaration, in favour of the defendant, he is entitled to the postea: *Vivian v. Blake* (b). With regard to the objection that the sheriff had no authority to try the cause, it is now too late to take advantage of it.

LORD ABINGER, C. B.—In point of fact, neither party is in a situation to sign judgment; it is an informal record, and no judgment can be given on it: but, if it could, the defendant might bring a writ of error. The sheriff had no power to try a case of this nature, as the act of Parliament does not extend to it. The judgment is a perfect nullity. The rule must be absolute for setting aside the judgment, and discharged as to the other part.

ALDERSON, B.—It is quite clear that the judgment ought to be set aside; but the latter part of the rule cannot be supported. Both parties have been guilty of an illegal act, in taking the case before a tribunal which was incompetent to try it.

Rule absolute for setting aside the judgment, but discharged as to the other part.

(a) 2 C. & M. 150.

(b) 11 East, 263.

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GOODTITLE on the Demise of BAKER and Another, v.
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EJECTMENT. At the trial before *Williams, J.*, at the last Spring Assizes for the county of Somerset, it appeared that the action was brought by the lessors of the plaintiff, who were executors and trustees under the will of one William Preest, to recover two closes of land, in the parish of Uphill, in that county, under the following circumstances. By indentures dated the 22nd and 23rd of December, 1812, and the 17th of July, 1813, one Simon Payne conveyed by way of mortgage two pieces of land in the parish of Uphill, called Warth's and Bennett's, to the said William Preest. In August, 1813, a local act, 53 Geo. 3. c. cii. was passed, for inclosing lands at Uphill, in the county of Somerset, and authorizing exchanges to be made as hereinafter mentioned. By consent of Simon Payne, Warth's and Bennett's were exchanged, under the act, for two other pieces allotted to him, called Horsington's and Richardson's. Payne contracted to sell the two last-mentioned closes to one Gegg for 800*l.*, and on the receipt of 400*l.* he, in the year 1814, authorized the commissioners under the inclosure act to give Gegg possession of them, and possession was accordingly delivered, and Gegg continued in possession

In 1812, S. P. conveyed two closes of land, in the parish of A., by way of mortgage, to W. P. In 1813, an inclosure act was passed for inclosing the waste lands in that parish; by which act the commissioners were empowered to set out, allot, and award any lands within the parish of A. in lieu of and in exchange for any other lands within that parish; provided that all such exchanges were ascertained, specified, and declared in the award of the commissioners, and were made with the consent of the owner or owners, proprietor or proprietors,

of the lands which should be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee simple, fee tail, or for life or lives, or for term of years absolute, or for term of years determinable upon life or lives; such consent to be testified in writing under his or their hands, &c. By the consent of S. P., the mortgagor, the above two closes of land were exchanged, under the act, for two other closes, and the commissioners stated in their award that the exchange was made with the consent of S. P. the mortgagor, in writing under his hand, but it was not stated to have been made with the consent of the mortgagee:—*Held*, that it was not necessary to say whether the consent of the mortgagee was necessary to give validity to the exchange, and that the Court had no right to presume that it was not given; for that the commissioners were not bound to state in their award all the authorities they had, and that the presumption was that they had acted according to their jurisdiction, as the contrary did not appear.

In ejectment, by a mortgagee against the assignee (under the Lords' Act) of the mortgagor:—*Held*, that a letter from the mortgagor to the mortgagee, dated previously to the assignment, was evidence against the defendant, and would be presumed to have been written at the time of its date, until the contrary was shewn.

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sion, and paid interest to Payne upon the remaining 400*l.*, till his, Gegg's, bankruptcy in the year 1826, when his assignees sold these lands by auction to one Edgar. Payne having become insolvent, the defendant, in the year 1831 became his assignee under the Lords' Act, 32 Geo. 2, c. 28. Payne died soon afterwards, and in August 1834, the defendant having called upon Gegg's assignees and Edgar to pay the remainder of the purchase money for Horsington's and Richardson's, and they having failed to do so, brought an action of ejectment against Edgar, in which, in the month of August 1835, he recovered a verdict, and had possession delivered to him accordingly (a). Prest, the mortgagee, died in the year 1820, and now the lessors of the plaintiffs, as his executors, brought this action to recover possession of the two closes called Horsington's and Richardson's, insisting that, under the provisions of the before-mentioned Inclosure Act, they were entitled to recover.

By the 7th section of that act it was provided, "That nothing in this act contained shall extend to, authorize, or enable the commissioners to determine the title to any messuages, lands, tenements, or hereditaments whatsoever; nor to determine any right between any parties contrary to *the possession* of any such parties, but in case the commissioners shall be of opinion against the right of the person so in possession, they shall forbear to make any determination until the possession shall have been given up by such person, or recovered by ejectment, or other due course of law." The 22nd section enacted, "That the commissioners shall and may from time to time deliver possession to the person interested in the divisions and allotments thereby directed to be made and set out, and such possession so delivered shall be kept and retained by the several persons entitled thereto against all persons whom-

(a) See *Doe d. Milburn v. Edgar*, 2 Bing. N. C. 391, 496; 2 Scott, 581.

soever, although the award hereinafter directed to be made shall not, at the time of the giving or delivering such possession, have been made and executed."

By the 24th section it was enacted, "That it shall be lawful for the commissioners to set out, allot, and award any lands, tenements, or hereditaments, within the parish of Uphill, in lieu of and in exchange for any other lands, tenements, and hereditaments, within the said parish, or within any adjoining parish, hamlet, township, or place, *provided that all such exchanges be ascertained, specified, and declared, in the award of the said commissioners, and be made with the consent of the owner or owners, proprietor or proprietors, of the lands, &c. which shall be so exchanged, whether such owner or owners, proprietor or proprietors, shall be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee-simple, fee-tail, or for life or lives, or for term or terms of years absolute, or for term of years determinable on life or lives; or with the consent of the guardians, trustees, feoffees for charitable or other uses, husbands, committees, or attornies, of or acting for any such owner or owners, proprietor or proprietors as aforesaid, who at the time of making such exchange or exchanges shall be respectively infants, femmes covert, lunatics, or under any other legal disability, or who shall be beyond the seas, or otherwise disabled to act for themselves, himself, or herself; such consent to be testified in writing, under the common seal of the body politic, corporate, or collegiate, or under the hands of the other consenting parties respectively; and all and every such exchange or exchanges so to be made shall be good, valid, and effectual in the law, to all intents and purposes whatsoever.*" The 28th section enacted, "That nothing in this act contained shall extend, or be construed or adjudged to extend, to prejudice any person having any right or claim of dower, jointure,

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annuity, rent-charge, incumbrance, or interest whatsoever, in, out of, upon, or affecting any of the lands hereby intended to be divided, allotted, and inclosed, or which shall be exchanged or assigned in compensation for any other estate or right in pursuance of this or the said recited act respectively; but as well the lands allotted, as the tenements or other hereditaments which shall be exchanged or assigned in compensation for any other estate or right shall immediately after such allotment, exchange, or assignment be made, be vested, remain, and endure, and the several persons to whom the same shall be allotted, assigned, or given in exchange as aforesaid, shall thenceforth stand and be seised and possessed thereof respectively, to, for, and upon such and the same uses, estates, interests, trusts, and purposes respectively, and subject and liable to such and the same uses, estates, interests, trusts, and purposes respectively, and subject and liable to such and the same wills, settlements, limitations, and remainders, conditions, charges, and incumbrances, as the several lands, tenements, and hereditaments, in respect whereof such allotments, assignments, and exchanges shall have been made should or would have stood severally limited, settled, vested, or subject or liable to, or been held by, in case the same land had not been allotted, assigned, or exchanged, and this act had not been made."

At the trial, the award was put in, which stated the exchange to have been made with the consent in writing, and under the hands of Horsington and Payne, as to one close, and of Richardson and Payne as to the other. The following letter, dated the 20th of December, 1818, from Simon Payne to Preest, was also given in evidence on behalf of the lessors of the plaintiff:—"Sir, The two allotments which you claim in Uphill, I certainly

received from Horsington and Richardson, in exchange under the Inclosure Act for lands in the mortgage to you, and some time since I agreed to sell them to Mr. Gegg, of Uphill, for 800*l.*; he paid me 400*l.* and was let into possession, and is still in possession. I have no objection to your receiving the other 400*l.* from him, on his completing his purchase, if you will pay me 100*l.* of it for my present purposes, and the rest can go towards the payment of the interest now due to you on the mortgage debt lent; you must join in the conveyance to Gegg, as he will not accept a conveyance from me alone. S. PAYNE." No part of this letter was in the handwriting of Payne except the signature. It was objected that this letter was not admissible in evidence, for that there was no proof when it was written, and though dated previously, it was not shewn to have existed prior to the defendant's becoming assignee of Payne's effects under the Lords' Act, in 1831. The learned judge however admitted the evidence, and the jury found a verdict for the plaintiff.

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Bompas, Serjt., in Easter Term, pursuant to leave reserved, moved for and obtained a rule to shew cause why the verdict should not be set aside, and a nonsuit entered, on the ground that the consent of the mortgagor to the exchange was not sufficient, and that the consent of the mortgagee also ought to have been shewn. He also obtained a rule for a new trial, on the ground that the letter was improperly received in evidence, and that the date of it was no evidence of the time when it was written.

Erle, *Crowder*, and *Barstow*, now shewed cause.—The 24th section requires all exchanges to be made with the consent of the "owner or owners" of the lands; but the mortgagee never having been in possession, he can never be considered as the "owner," but only as a person having an incumbrance on the land, within the 28th sec-

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tion; and consequently his consent was not necessary to this exchange, and the consent of the mortgagor was sufficient. The term "owner" in section 24, frequently refers to persons not having the legal estate in them. The 28th provides, that the act shall not extend to prejudice any person having any incumbrance or interest in or upon any lands thereby intended to be allotted, or which should be exchanged for any other estate in pursuance of that act, but, as well the land allotted as the tenements exchanged, shall immediately after such allotment or exchange be vested and enure to the same uses and estates, and subject to the same charges and incumbrances as the lands in respect of which such allotments and exchanges shall be made should or would have stood subject or liable to in case the same allotments or exchanges had not been made; so that it shifts the incumbrance to the land taken in exchange. [*Alderson, B.*—These two sections shew that the mortgagor is to be considered as the owner, and the mortgagee as the person having the incumbrance, which the act directs shall affect the land taken in exchange]. Payne expressly claimed, before the commissioners, to be the owner of Warth's and Bennett's, and consented in writing to the exchange for Horsington's and Bennett's, and therefore he, or those claiming under him, cannot be admitted to say that he was not the owner.—Secondly, the letter was clearly admissible in evidence as an admission against the mortgagor that the mortgage was a continuing mortgage, so as to rebut any presumption of payment from the lapse of time: *Gleadow v. Atkin* (a). It contains an admission by Payne, under whom the defendant claims, against his interest, and is therefore evidence against him. It is said that it might have been written to the prejudice of the defendant, after the assignment had been made to him

(a) 1 C. & M. 410.

under the compulsory clauses in the Lords' Act: but the letter is dated prior to the assignment, and it must be presumed, as against the defendant, that it was in existence at the time of the date, in the absence of evidence to the contrary: *Hunt v. Massey* (a), *Taylor v. Kinloch* (b), *Smith v. Battens* (c), *Obbard v. Betham* (d). The presumption is in favour of the correctness of the date of the letter, and it lies on the other side to shew the contrary. [Alderson, B.—How do you shew a deed to be thirty years old, but by producing a deed dated so far back?] But although the letter was admissible, it was not necessary to support the case, since there could be no adverse possession as between these parties; for the occupation must be taken to have been by the permission of the mortgagee: *Hall v. Doe d. Surtees* (e).

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Bompas, Serjt., and *Ball*, in support of the rule.—In *Hunt v. Massey*, the date of the letter was held to be evidence as against the original party writing the letter, but here the defendant is merely Payne's assignee under the compulsory clauses in the Lords' Act, and he is therefore an assignee against his will. [Lord Abinger, C.B.—He stands in the same situation as Payne.] If the letter were written after the assignment, it clearly would not be admissible, and the plaintiff was therefore bound to shew that it was written before. This case is also distinguishable from *Hunt v. Massey* by the circumstance, that here the letter itself is not in Payne's handwriting, but only the signature. In the case of *Wright v. Lainson* (f), which came before this Court yesterday, one of the questions was, whether certain I. O. U.'s which were given in evidence to prove the petitioning creditor's debt, and which bore date before the act of bankruptcy, were evidence of a debt due before the act of

(a) 3 Nev. & Man. 109.

(b) 1 Stark. N. P. C. 175.

(c) 1 Moo. & Rob. 341.

(d) Moo. & Malk. 486.

(e) 5 B. & Ald. 687.

(f) Ante, 739.

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bankruptcy, and the Court held that they were not. This case is nearly identical. [Lord *Abinger*, C. B.—No; the distinction is, that here the letter is produced in evidence *against* the insolvent; which is the converse of that case. In the case of assignees, who are seeking to set up a right, and have to prove the petitioning creditor's debt, they are bound to shew that the bill of exchange, the subject of the petitioning creditor's debt, was in existence before the bankruptcy. Here the lessors of the plaintiff are seeking to give this in evidence against the assignee of Payne, the insolvent, whose letter it purports to be. Who ever heard that a letter written by a bankrupt before his bankruptcy is not evidence against his assignees? If you were to shew fraud, it might be a different case.] To make the letter admissible, it was incumbent on the plaintiff to shew that it was against Payne's interest at the time he wrote it. The cases cited, it is submitted, are in no way analogous to this case. If Payne were now alive, he might by these means convey away all his estate. [Lord *Abinger*, C. B.—You assume that, in order to prejudice his assignees, the insolvent has put a false date to his letter.]

Secondly. The 24th section gives no authority to convey under these circumstances. The mortgagor must shew that he had a legal title to convey the estate. He cannot derive any title from possession alone. If the mortgagor only had authority to exchange, he might exchange all the land mortgaged to the detriment of the mortgagee. The mortgagor does not answer the description of any of the persons mentioned in the 24th section, for he is neither the owner nor the tenant in fee simple, nor tenant in tail, or for life or years. The cases have decided that this is a strict legislative qualification, and that the powers of the act must be strictly pursued: *Wingfield v. Tharp* (a). If the mortgagor is not owner,

(a) 10 B. & Cr. 785.

viz., either in fee simple, fee tail, for life or years, then his consent is not sufficient. [*Alderson, B.*—How can a man be owner for a term of years? Does not that shew that by the words in the statute possession is meant?] To hold the consent of the mortgagor to be sufficient would lead to great inconvenience. [*Lord Abinger, C. B.*—It does not follow that the mortgagee loses his title to the land mortgaged.] It must be so, because the 24th section concludes by enacting that the exchange “shall be good, valid, and effectual in the law to all intents and purposes whatsoever.” [*Alderson, B.*—The act says that the lands taken in exchange shall be liable to the incumbrance. It does not say that the other lands shall be exonerated. I do not see that it is by any means clear that the mortgagee has not a claim both on the original lands and those taken in exchange. I see nothing in the act to discharge the first lands. It is similar in its terms to the General Inclosure Act, 41 Geo. 3, c. 109, with an additional clause imposing a liability upon the new lands taken in exchange. *Lord Abinger, C. B.*—Look at the 7th section: the commissioners are not to determine any right contrary to the *possession*. They must look at the *possession*; so that the mortgagee would not get any allotment at all if it were not for the allotment made to the mortgagor in possession. The act supposes it will be for the benefit of all parties. Such provisions are often introduced to remove difficulties, when estates are settled in strict settlement. We must consider whether the act does not mean the owner or owners in a popular sense; prohibiting the commissioners, as it does, from making any award in favour of any person not in possession.]

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Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—We have considered this case, and have looked at the case of *Wingfield v. Tharp*, which

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was cited by my Brother *Bompas*. The marginal note of the case does not support the point for which it is cited; and on looking at the body of the case, we find that this point was not made. The Court is of opinion that the plaintiff is entitled to recover. It is not necessary to say whether the consent of the mortgagee was necessary in order to the validity of the exchange, because we think that here we have no right to presume that it was not obtained. The commissioners were not bound to set forth in their award all the authorities they had, and the presumption is that they acted according to their jurisdiction, unless the contrary appears; and the setting forth that they had the authority of the mortgagor does not preclude the presumption that they had also that of the mortgagee. If it were proved that there was no such consent, the point would arise whether there would be a good title to the exchanged lands without it; but there is *prima facie* evidence that he did in fact consent, for the mortgagor took the exchanged lands, and possessed and enjoyed them for many years, which he would have had no title to do, unless the consent of the mortgagee had been obtained, supposing that were necessary to give him a title. The mortgagor, therefore, who says that such consent was necessary, has acted as if he had it, by taking and retaining possession of the land. Again, there is no question that the letter of the mortgagor was to be read as a document of the date which it purports to bear; and that letter also refers the mortgagee to a transaction known between them, which implied that every thing was rightly done; indeed, it speaks expressly of the sale of the exchanged lands. On these grounds, we are of opinion that the plaintiff is entitled to recover, and that the rule ought to be discharged.

Rule discharged.

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WILSON and Another v. BARTHROP.

ASSUMPSIT on a bill of exchange. The declaration stated that the defendant, using the name and style of Jonathan Barthrop & Son, on the 30th of July, 1836, made his bill of exchange, directed to one John Hanson, and thereby required the said John Hanson to pay to the order of the defendant 300*l.*, two months after date; that the defendant, using the said name and style, indorsed the said bill to the West Riding Union Banking Company; and that Hanson did not pay the same when due. Pleas, first, that the defendant did not draw the said supposed bill of exchange in manner and form, &c.; second, that he did not indorse the bill of exchange as alleged. At the trial before the Lord Chief Baron, at the Middlesex Sittings after Michaelmas Term, 1836, it appeared that the defendant's father and brother, in conjunction with a person named Henry Halliley, formerly carried on business at Wakefield as woolstaplers, under the firm of Jonathan Barthrop & Son. Jonathan Barthrop died in September, 1835, leaving Henry Halliley executor of his will. Barthrop, the son of Jonathan, (the other partner), had died two years before. Upon the death of Jonathan Barthrop, Halliley determined to close the concern, and he employed the defendant, Edwin Barthrop, (another son of Jonathan Barthrop), who had previously been employed as clerk to the firm, to wind up the affairs. In this character the defendant attended the warehouse, and transacted business with different parties on account of the firm. John Hanson, the acceptor of the bill in question, was a debtor to the firm in a considerable sum. The defendant drew upon him, using the name of the firm, and he discounted the bill with the West Riding Banking Company, who gave him the amount in cash. The plain-

Three persons carried on business as partners, under the firm of J. B. & Son: two of the partners died, and the surviving partner employed the defendant, who had previously acted as a clerk to the firm, to wind up the affairs. In this character the defendant attended the warehouse, and transacted business with different parties on account of the firm. Under these circumstances, the defendant, using the name of the firm, drew upon J. H., a debtor to the firm, a bill of exchange, which J. H. accepted:—*Held*, that the defendant was not liable as the drawer in an action upon the bill, his name not being affixed to it, without some proof that he had no authority to draw bills in the name of the firm, or that he had not acted *bonâ fide*.

Quare, whether, if it had been proved that he had no

such authority, he would have been liable in an action upon the bill.

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tiffs were the registered officers of the Banking Company, suing for the benefit of the company. When the bill became due and was dishonoured, the defendant offered to take it up by giving other bills, but this offer was refused by the bank. Upon these facts appearing in evidence, the Lord Chief Baron directed a nonsuit to be entered. In Hilary Term last, *Hoggins* obtained a rule to shew cause why the nonsuit should not be set aside, and a new trial had; against which

Knowles shewed cause.—The nonsuit was right, for the evidence shewed that the defendant had drawn the bill not as his own bill, but as the bill of Barthrop & Son. The firm of Barthrop & Son was still in existence when the bill was drawn, and the defendant had been engaged by the surviving partner to manage the concern. It might be contended that a power to draw bills was incident to such an employment; but at all events some evidence ought to have been offered by the plaintiff to shew that such authority was not given: for the court will not intend that the defendant committed forgery, by drawing a bill without authority. It has never yet been held that a party can be made liable as drawer, whose name is not on the bill. Perhaps the defendant might have been made liable in another form of action. He might have been sued for falsely representing that he had authority to draw bills in the name of the firm, on the principle established in *Polhill v. Walter* (a). But he cannot be charged as the drawer of a bill of exchange to which his name is not affixed.

Hoggins, in support of the rule.—The defendant was only employed and authorized to wind up the concern, and had no authority to draw bills. It ought to have been left as a question to the jury whether the defendant drew and indorsed

(a) 3 B. & Adol. 114.

the bill on his own account or not. [Lord *Abinger*, *Esch. of Pleas*, 1837. }
 C. B.—If the defendant has applied the money to his own use, and had no authority to draw bills, it was for you to have shewn that, and then you might possibly have been entitled to sue for money had and received.] It is stated in the note to *Thomas v. Hewes* (a) to have been laid down by *Bayley*, B., as a general rule, that where an agent makes a contract in the name of his principal, and it turns out that the principal is not liable, for the want of authority in the agent to make such a contract, the agent is personally liable on the contract. The defendant was here personally liable, because he had no authority to draw bills in the name of the firm, and the onus lay upon him to shew that he had such an authority.

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Cur. adv. vult.

The judgment of the Court was now delivered by

LORD ABINGER, C. B.—This was an action on a bill of exchange, drawn in the name of a certain firm, by the defendant Barthrop, and discounted by the plaintiffs, who are bankers at Huddersfield. Upon the trial the evidence appeared to be this:—that the defendant had been clerk in a firm which consisted of his father, his brother, and a gentleman of the name of Halliley. The father and brother are now dead; but during their lifetime the defendant had been allowed to carry on their business as their clerk, and he acted in that capacity under the authority and sanction of Halliley, the surviving partner. It appeared that the firm were employed to sell goods on commission; and under these circumstances it is that the defendant draws this bill; he draws it, and signs the name of the firm, Jonathan Barthrop and Son. The plaintiffs brought the action against him upon this bill,

(a) 2 C. & M. 530.

Exch. of Pleas, considering him as the drawer. Upon this state of
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BARTHOLOPE. must be nonsuited. A motion was made to set that nonsuit aside, on the ground that the defendant was liable, because he drew the bill having no authority to draw it. Without considering whether a party whose name is not put to a bill of exchange, but who merely draws it without authority, can be made liable in an action upon the bill,—a question which does not necessarily arise in this case,—we are of opinion, that before a party can be charged with a transaction of this sort, there must be some proof that he had no authority to draw on behalf of the firm,—there must be some proof that he has not acted *bonâ fide*. It is no uncommon transaction for clerks to be allowed to use the name of the firm in drawing cheques or bills, and it has never yet been considered that clerks were liable to an action, as if they themselves were the drawers of the bill or cheque; some evidence ought to be given to raise the point that the party has used the name without authority. The evidence in this action not only failed in that respect, but as far as I understood the evidence, it was rather the other way. The defendant was the confidential clerk, employed wholly at the counting-house, having the whole of the books, from which circumstances it is rather to be inferred that he possessed authority than the contrary. We are of opinion that there ought to be some evidence to shew that he had no authority whatever to draw in the name of the firm, and on that ground we think the rule ought to be discharged.

Rule discharged.

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CHAPPELL *v.* POLES and Others.

ASSUMPSIT for money had and received. Pleas, non-assumpsit, and a set-off for the sum of 5*l.* 2*s.*

The cause was tried before *Williams, J.*, at the last Spring Assizes for the county of Somerset, when it appeared that the plaintiff had been the father of an illegitimate child, and that this action was brought against the defendants, who were the churchwardens and overseers of the parish in which the child was born, to recover back from them a sum of money which he had paid them to exonerate him from the charge of its maintenance. The child was born on the 19th of April, 1832, during the year that the defendants were in office. In the month of June, 1832, an order of filiation was made upon the plaintiff, requiring him to pay the sum of 2*l.* 7*s.* for expences already incurred, and 2*s.* per week as long as the child should continue chargeable to the parish. On the 18th of September, the plaintiff paid to the defendants, through the hands of his uncle, who had money of the plaintiff's in his hands, the sum of 30*l.*, and a receipt was given, signed by all the defendants, which stated it to have been received "to exonerate him (the plaintiff) from all further charges and expences that may occur from a certain base child sworn to him," &c. The child died on the 26th of January, 1833. When the defendants went out of office, at Lady-day, 1833, there was a balance of parish money in their hands amounting to 116*l.* 12*s.*, in which balance was included the sum of 30*l.* received from the plaintiff; and this amount they handed over to their successors on going out of office. It appeared, however, that the defendants had expended the sum of 5*l.* 2*s.* in maintaining the child, and this was the subject of the set-off. The jury found a verdict for the plaintiff

Where a party paid money to parish officers, to exonerate him from all charges and expences that might occur from a bastard child, affiliated on him, and the child died during the same year, whilst they continued in office:—

Held, that an action for money had and received was maintainable against those parish officers, to recover the money not expended in maintaining the child, although they had since quitted office, and handed over the money to their successors.

Semble, also, that the *whole sum* so paid was money had and received to the plaintiff's use, from the time it was so paid, as the contract was, from the beginning, illegal and void.

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for 24*l.* 18*s.*, being the balance of the 30*l.*, after deducting the sum of 5*l.* 2*s.* so expended. The learned judge gave the defendants leave to move to enter a nonsuit; and *Erle* having in Easter Term obtained a rule accordingly,

Sir *W. W. Follett* and *Halcomb* now shewed cause.—The child having died before the defendants went out of office, the money remaining in their hands became money had and received to the plaintiff's use. If the defendants intended to rest their defence upon the payment over of the money to their successors, that ought to have been specially pleaded since the new rules. Whenever a party confesses an original liability, but seeks to get rid of it by some matter *ex post facto*, he is bound to plead it specially. The Court, on this rule being moved, appeared to think there was some inconsistency between the case of *Rex v. Martin* (a) and the other cases on this subject; but that is in truth an authority in favour of the plaintiff. The first case was that of *Cole v. Gower* (b), where it was held that the stat. 6 Geo. 2, c. 31, only authorized parish officers to take security from the putative father of a bastard child to indemnify the parish: and therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum, as the amount of the charge actually sustained by the parish, which tender was found for the defendant, it was held that the plaintiffs could not recover further upon the note. The Court there said, that the taking of money to exonerate a parish was against public policy, as giving the parish an interest in the child's death. In *Townson v. Wilson* (c), the defendants had gone out of office, and the child, as in the present case, had died, and it was held that an action like the present was maintain-

(a) 2 Camp. 268.

(b) 6 East, 110.

(c) 1 Camp. 396.

able. Lord *Ellenborough* there said, "If any person gets money into his hands illegally, he cannot discharge himself by paying it over to another; and the contract under which this money was paid was certainly illegal, as it gave the parish an interest in abridging the life of the child." He afterwards added, "The chief objection to the action appears to be, that the parties may be represented as in *pari delicto*." That objection was afterwards taken by *Park*, as counsel for the defendants, in a case mentioned in a note to the former case, *Stainforth v. Staggs* (a). He argued that, the parties being in *pari delicto*, the money could not be recovered back: but the objection was answered by *Lawrence, J.*, who said, "There is no *delictum*. The money was paid upon a supposed consideration, which cannot be effected, and may therefore be recovered back as money had and received to the plaintiff's use." *Fernall v. Horne* (b) was also a decision to the same effect. Here, moreover, there is a fact which might distinguish this case from those cited, viz. that this money was not paid by the plaintiff, but by his uncle, and therefore the plaintiff could not be said to be guilty of any *delictum*. If it be an illegal act, he is not a party to it. In *Watkins v. Hewlett* (c), the case of *Rex v. Martin* (d) is cited as an authority in favour of this action; and it is submitted that it is; for Lord *Ellenborough* there says, "The putative father could only have recovered back so much of the money as was not expended upon the maintenance of the child, and the lying-in of the mother." That case is however distinguishable in this, that there it did not appear but that the child was still alive. In *Watkins v. Hewlett*, it was not contended that the action was not maintainable; it was conceded on all hands that it was. In *Clark v. Johnson* (e), the court fully considered all these

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(a) 1 Camp. 398.

(b) Ibid. 564.

(c) 1 Brod. & B. 1.

(d) 2 Campb. 268.

(e) 3 Bingh. 424.

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cases, and affirmed them. It was there held, that the mother of an illegitimate child might recover, in an action for money had and received, money deposited with a parish officer to meet any charges to which the parish might be liable in respect of the child. And in that case also the child, though it had never become chargeable, was still living.—They also cited *Gilbert v. Sykes* (a), and *The Overseers of St. Martin v. Warren* (b). [*Parke, B.*—If this were a question on the Statute of Limitations, you would contend that the statute would begin to run from the time that the money was paid, and not from the time the child died.] At all events it would run from the moment the child died, as it clearly ought then to have been paid over to the plaintiff, and the payment by the defendants to their successors amounted to nothing.

Erle, contra.—The action for money had and received is not maintainable, inasmuch as this was an illegal contract in its inception. Besides, this money, which was paid to these defendants in their public capacity, has been handed over by them to the new officers, according to their duty; and the person who paid it cannot now recover it back from them. [*Parke, B.*—If this was ever money had and received in the hands of the defendants, and they have done an act which they say discharged them from liability, they ought to have pleaded it.] In *Howson v. Hancock* (c), it was held that where money deposited upon an illegal wager has been paid over to the winner, by the consent of the loser, the latter cannot afterwards maintain an action against the former to recover back the deposit. In *Hastelow v. Jackson* (d), where it was held that the action was maintainable by a party to recover back his own deposit, that was because before it was paid over the plaintiff

(a) 16 East, 157.

(b) 1 B. & Ald. 491.

(c) 8 T. R. 575.

(d) 8 B. & Cr. 221.

had prohibited the stake-holder from paying over the stakes, which was a valid prohibition as to his own moiety. Here the money was not paid to the defendants for their own individual benefit, but was carried by them to the parish accounts; and that being done with the plaintiff's consent—for it was paid to them by him for that purpose—this distinguishes the case from those cited. This was an illegal contract from the beginning, which either party might have rescinded; but as the money has been paid over by the defendants to their successors, it is now too late to do so. [*Parke, B.*—Did the contract need rescinding at all? Was it not money had and received from the beginning?] If the defendants had kept the money in their hands, without paying it over to the parish accounts, they would have been indictable; *Rex v. Martin (a)*. If both parties agree that the money shall be handed over to the parish, no action is maintainable.

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LORD ABINGER, C. B.—In deciding this case, if we adhere to the principles of the series of decided cases, we must consider this point as settled, and that the plaintiff is entitled to recover. The case of *Rex v. Martin* is in one respect distinguishable—as, under the particular circumstances of that case, the party was bound to pay over the money. Lord *Ellenborough* had before decided that such a contract was illegal, and that the money might be recovered back. I am disposed to refer that part of the judgment in *Rex v. Martin*, in which it is said that the officer is subject to an indictment, to such a portion of the money as he was bound to pay over. Here the contract of indemnity was not a contract which the law warranted. But supposing we should consider the contract lawful, as an indemnity to the parish officers—the death

(a) 2 Campb. 268.

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of the child left the other money in their hands, which, at all events, they ought to have repaid to the father, after the object of the payment by him had been exhausted. I do not think they were authorized to pay it over to the parish. Even in the narrowest construction of the case, he would be entitled to recover the money not expended. But the better way is to put it on the broader ground, and then, from the decided cases, it is clear the money was paid upon an unlawful consideration.

PARKE, B.—I am of the same opinion, and think the plaintiff is entitled to recover. Mr. *Erle* has properly conceded that the action is maintainable in some cases. The case of *Clark v. Johnson* not only decided that a security given was void, but that money paid to parish officers as an indemnity was, under these circumstances, illegal, and that the plaintiff had a right to disaffirm the contract, and recover back the money paid over. Mr. Justice *Lawrence* had before decided that the parties were not in *pari delicto*. The Statute of Limitations would begin to run from the moment the money was paid to the parish officer. The judgment of the Court of Common Pleas has gone the length of saying, that the parish has no right to take any indemnity except that which is in accordance with the statutes. But assuming that this is a legal contract, and that the money was properly deposited in the hands of the defendants to indemnify themselves, even in that point of view the plaintiff would be entitled to recover any money remaining in their hands upon the death of the child; and the implied undertaking to pay the money over to their successors, which Mr. *Erle* suggests, could not arise, as the only ground on which it could be presumed would be that the child continued chargeable to the parish: but if the child dies during the continuance in office of those who received the money,

there would be no presumed direction on the part of the father to pay it over to any one. Then we have the express decision of Lord *Ellenborough*, in *Townson v. Wilson*, upon the principal point. It seems to me, however, that this was, from the beginning, a void, illegal contract; that from the first it was money had and received to the plaintiff's use, and therefore the action was properly brought against the present defendants.

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BOLLAND, B., and GURNEY, B., concurred.

Rule discharged.

—◆—
In re PERING.

THIS was a petition of right presented by Mr. Richard Pering, addressed "To the King's Most Excellent Majesty, in his Court of Exchequer at Westminster," praying for compensation for the use of his patents for the improvement of anchors, and for other services rendered at his Majesty's dock-yards. It appeared from the petition, that Mr. Pering had held the successive offices of Storekeeper in the dock-yards at Sheerness and Woolwich, and Clerk of the Cheque in the dock-yard at Plymouth, from the year 1782 to the year 1821. In July, 1813, he obtained a patent for an invention, by which anchors were enabled to be made of much greater strength, relatively to their weight, than any anchors previously made; with the usual reservation in favour of his Majesty. Satisfactory trials having been made of the strength of the anchors, the result was, that the Lords Commissioners of the Admiralty issued an order, on the 20th November 1815, that anchors should be made on Mr. Pering's principle. Anchors were accordingly made for the public service according to the patent, and under Mr. Pering's instruction; for which use of his patent, and

A petition of right was addressed to the King "in his Court of Exchequer," and concluded with a prayer that he would be pleased to order that right be done, and to indorse his royal declaration thereon to that effect; and that he would refer the petition, with such order and declaration thereon, "to the Barons of his Majesty's Exchequer." The King indorsed the petition, "Let right be done:"—*Held*, that this Court had no jurisdiction to adjudicate upon the matter.

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for his labour, time, and expense in enabling his Majesty's navy to have the benefit of it, Mr. Pering was, by an Admiralty Order of the 21st of June, 1821, allowed the sum of 1500*l.* as a remuneration. In the year 1822, Mr. Pering, having served forty years, was allowed to retire upon a pension of 450*l.* per annum, calculated in the usual way according to the amount of salary and period of service. After his retirement, he continued to make suggestions of improvements in the construction of anchors; and in the year 1830, having invented an additional improvement in their formation, obtained a patent containing a proviso for making the same void if he, Mr. Pering, his executors, administrators, or assigns, should not supply or cause to be supplied, for his Majesty's service, all such articles of the said invention as he or they should be required to supply, in such manner, and at such times, and at and upon such reasonable prices and terms, as should be settled for that purpose by the Commissioners of his Majesty's Navy for the time being. In August, 1831, a trial of an anchor constructed on this improved principle was made under the order of the Commissioners, and a favourable report having been made, Mr. Pering, at the request of the Commissioners of the Navy, drew up instructions for the guidance of smiths at the dock-yards in making the improved anchor, and on that occasion he was occupied three months, and incurred considerable expense, in superintending the construction of the anchor, and in journeying to and from Plymouth and in staying at that place; but had neither received his expenses nor any remuneration. Various applications had been made to the Board and to the First Lord of the Admiralty, but without effect. Mr. Pering afterwards applied to the Court of King's Bench for a mandamus to the Lords of the Admiralty, commanding them to fix a reasonable price to be paid to him for the use of his patent, but the rule was

refused (a). The present petition, after stating the facts, prayed that his Majesty would be graciously pleased to order that right be done in this matter, and to indorse his royal declaration thereon to that effect; and to refer the petition, with such royal order and declaration thereon, *to the Barons of his Majesty's Exchequer*. The King's indorsement, (written in the margin opposite the body of the petition), was, "Let right be done." There was also the following memorandum at the foot of the petition, by the Secretary of State for the Home Department: "His Majesty is pleased to refer this petition to the Attorney-General to consider thereof, and to take the necessary steps thereon. J. Russell."

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The *Attorney-General* objected that this Court had no authority or jurisdiction in a matter of this nature. The indorsement refers this petition to the Attorney-General, who is to consider of it, and either to confess or deny the facts stated in it; and unless he confesses it, there ought to be an inquisition to ascertain whether the suggestions are true or not. [Lord *Abinger*, C. B.—What has this Court to do with a petition of right which is referred to the Attorney-General? Alderson, B.—It should seem as if it ought to be referred to the Chancellor. In Com. Dig. tit. Prerogative, D. 80, it is laid down, that "upon petition out of Parliament, or there (if not pursued by a statute), it shall be indorsed by the King, *Soit droit fait*, and then delivered to the Chancellor." It also appears, that it may be indorsed by the King to the King's Bench or Common Pleas.] Lord Keeper *Somers* goes much at length into the course of proceedings, in his judgment in *The Bankers' Case* (b). He says, "The manner of answering petitions to the person of the King was very

(a) See *Ex parte Pering*, 6 Nev. & Man. 472.

(b) How. State Trials, Vol. 14, p. 59, edit. 1816.

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various, which variety did sometimes arise from the conclusion of the party's petition, sometimes from the nature of the thing, and sometimes from favour to the person, and according as the indorsement was the party was sent into Chancery or the other Courts. If the indorsement was general, 'Soit droit fait al partie,' it must be delivered to the Chancellor of England, and then a commission was to go to find the right of the party, and that being found, so that there was a record for him, thus warranted, he is let in to interplead with the King. But if the indorsement was special, then the proceeding was to be according to the indorsement in any other Court. This is fully explained by Stamford in his *Treatise of the Prerogative*, cap. 22." In the present case the petition is, that his Majesty will be graciously pleased to order that right be done in this matter, and to indorse his royal declaration thereon to that effect, "and to refer the petition, with such royal order and declaration thereon, to the Barons of his Majesty's Exchequer." The latter part of this petition had not been complied with.

The Court then called upon

W. H. Watson, who appeared for the petitioner.—A petition of right lies to any of the Courts at Westminster. [Lord *Abinger*, C. B.—The King may refer it to any of the Courts: for instance, upon a matter touching real property, he may refer it to the Court of Common Pleas; upon a point of criminal jurisdiction, to the King's Bench; or upon a matter relating to the revenue, to this Court.] This petition was presented to the King "*in his Court of Exchequer at Westminster.*" [Lord *Abinger*, C. B.—Is there any precedent of such a petition? The presenting the petition to the King *in his Court of Exchequer*, cannot give this Court jurisdiction.] The petition prays the King to refer it "to the Barons of his Majesty's Ex-

chequer,"and the indorsement by the King is, "Let right be done. [Lord *Abinger*, C. B.—But as to the mode of doing it, he requires the advice of the Attorney-General. When the King says, "Let right be done," it means in the Court of Chancery.] The authorities shew that that is where the petition is general, not where it is special. Where the petition prays that right be done in the Exchequer, and the King indorses it, "Let right be done," the right is to be done in the Exchequer. [*Alderson*, B.—The King does not say, "Let right be done *in his Court of Exchequer*." The authorities seem to say, that unless the King indorses it to the Exchequer, it is in the Court of Chancery—"Soit droit fait" is in the Chancery. Lord *Abinger*, C. B.—Unless the King specially indorses it to this Court, we have no jurisdiction.] This Court adjudicated upon the petition in *Sir Henry Nevil's* case (a). [*Alderson*, B.—How does it appear that there was a petition of right in that case?] In a note at the end of the case, the learned reporter says, "From this record may be seen the order and form how one who has a rent out of the land in the King's hands, shall make his petition to the Court of Exchequer, to come at it without making petition to the King's person, and also how he shall have the judgment executed; for it is not the course to command by parol that payment be made, but a writ in the form affixed shall be awarded by the barons." [Lord *Abinger*, C. B.—This is not a petition to the Court of Exchequer, but to the King in person.] In *Sir Thomas Wroth's* case (b), this Court gave judgment upon a petition by him for the payment of the arrears of an annuity granted to him for his life by King Hen. 8, by patent. [*Bolland*, B.—That was not the case of a petition of right.] In Manning's Exchequer Revenue Practice (c), it is said, "Where a right is sought to be established against the crown itself, the course prescribed by the common law is to address a petition to the King *in one of his Courts*

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(a) Plowden, 377.

(b) Ibid. 452.

(c) Page 84.

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of Record, praying that the conflicting claims of the crown and the petitioner may be duly examined. As the prayer of this petition is grantable *ex debito justitiæ*, it is called a petition of right, and is in the nature of an action against the King, or of a writ of right for the party, though chattels, real or personal, debts, or unliquidated damages, may be recovered under it;—for which passage numerous authorities are cited. In Viner's Abr., tit. Prerogative of the King, Q 13, pl. 2, it is said, "The justices of B. R. may proceed to the examination of the matter by themselves, if the petition contains that the King commands them to examine it, and this without original out of Chancery." In this case the King says, "Let right be done," which must be taken to be according to the terms of the petition, which prays that right may be done, and that it be referred to the Barons of the Exchequer.

LORD ABINGER, C. B.—If one single precedent had been cited to shew that upon the general indorsement, "Let right be done," this Court had proceeded to adjudicate upon the petition, I should have yielded to the argument; but though there must have been various petitions of this sort, none has been shewn, and we have no authority to warrant our proceeding in the present case. If the King had indorsed the petition, "Let right be done in the Court of Exchequer," we should have had authority to adjudicate upon it; but until such an indorsement is made, we think we have no authority to interfere.

BOLLAND, B., concurred.

ALDERSON, B.—In Com. Dig. Prerogative D. 80, it is laid down, that if a petition have a special conclusion that the King command his justices of a particular Court, and it be indorsed in accordance, it shall be pursued there. In this case the King has not indorsed it in accordance with the special conclusion of this petition.

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THE time for putting in bail in this cause expired on the 6th of May, but a week's further time to put in bail was given on application by a judge at chambers. On the 12th of May notice of justification before a Judge at chambers was given, which omitted to state at what hour they would justify. The plaintiff having taken an assignment of the bail-bond, and commenced actions upon it, on the 15th of May he informed the defendant of the assignment, and on the 16th acquainted him of his having commenced the actions. On the 26th of May, being the fourth day of Easter Term, *Butt* obtained a rule to shew cause why these proceedings should not be set aside for irregularity. Against which rule

A notice of justifying bail at chambers must state the hour of attendance.

But though the notice be irregular, in not stating the hour, yet the plaintiff is not at liberty to treat it as a nullity, and commence proceedings on the bail-bond before the time for justification has expired.

Miller now shewed cause.—The first question is, whether a notice of justification, omitting to state the hour, may be treated as a nullity. It would be a great hardship on the plaintiff if he were compelled to attend the whole of the day. In *Staines v. Stoneham* (a), it was expressly held that a notice of justification of bail at chambers, not specifying the hour, is a nullity.

Where a defendant, having had notice on the 16th of May of actions having been commenced on the bail-bond, applied on the 26th of May (being the 4th day of term) to set aside the proceedings:—*Held*, that the application was not too late.

Butt, contra.—The marginal note of *Staines v. Stoneham* is not warranted by the facts. But assuming that the notice of justification was irregular, the plaintiff was not entitled to treat it as a nullity; because the parties had four days in which they might have rendered the defendant. [*Parke*, B.—That is so; they ought not to have proceeded on the bail-bond before the time of justification had expired.]

Miller.—The time the defendant has taken is unreasonable, and the application is now too late. [*Parke*, B.—Surely the lapse of eight days is not to conclude the parties.]

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In *Fynn v. Kemp* (a), a motion to set aside proceedings was held too late after seven days; and in *Hinton v. Stevens* (b), it was held that if a copy of a writ is served in vacation, objection to it for irregularity must be taken in vacation, if there is time for that purpose.

Per Curiam.—We do not think that, under the circumstances, the application is too late.

Miller having obtained a cross rule, to shew cause why the justification and allowance of bail should not be set aside, on the above objection to the notice of justification,

Butt shewed cause.—The hour need not be stated, and there is no rule which requires that it should. The 11 Geo. 4 & 1 Will. 4, c. 70, s. 12, which provides that bail may be justified before a Judge at chambers, merely substitutes that for a justification in court; and there no notice of the hour is required. There would also be great inconvenience in requiring it, as the parties cannot tell at what hour the Judge will attend at chambers. But even if it is an irregularity, it is not a void notice, so as to nullify the allowance of bail. It has never been considered at all necessary to give the hour, and the forms given in several of the books of practice do not state it.

PARKE, B.—We will confer with the Masters of the other Courts, whether the established practice is to state the hour.

Afterwards—

PARKE, B. said:—We have consulted the Officers of both the other Courts, and they say it is the usual practice to insert the hour. This rule will therefore be absolute, but, for the reasons stated, without costs.

Rule absolute.

(a) 2 Dowl. P. C. 620.

(b) 4 Dowl. 283.

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A NOTICE of declaration was given, and a demand of plea made, on the 28th of April. A rule to plead had been served before notice of declaration. On the morning of the 2nd of May, the plaintiff signed judgment for want of a plea. Two summonses for further time to plead were taken out on the 1st of May, the last returnable in the afternoon of the 2nd. An appearance had been entered according to the statute, but no notice of taxing costs had been given. *Shee* having obtained a rule to shew cause why the judgment should not be set aside for irregularity,

When a rule to plead is given before notice of declaration, it is irregular; but the irregularity is waived by taking out a summons for time to plead. A notice of taxation of costs is unnecessary where the defendant has not appeared.

Moody shewed cause.—The plaintiff was entitled to sign judgment on the 2nd of May. It is true the rule to plead was irregular, as it was given before any notice of declaration: *Bennett v. Smith* (a). But here the defendant was not entitled to a demand of plea, as he had allowed an appearance to be entered for him. [*Parke*, B.—That is different from a rule to plead. It is laid down in *Tidd's Practice* (b), that there must be rule to plead in all cases.] Then that irregularity has been waived by taking out the summonses for time to plead; *Nugee v. M'Donnell* (c). No notice of taxation of costs was necessary, as the defendant has not appeared. The rule H. T. 4 Will. 4, s. 17, expressly says, that notice of taxing costs shall not be necessary where the defendant has not appeared. Then the defendant is not entitled to set aside the judgment on payment of costs, as his affidavit is merely in these terms, “considering he had a good defence on the merits,” which is not sufficiently certain. [*Parke*, B.—That is not swearing positively.]

(a) 3 Bing. N. C. 305; 3 Scott, 673.

(b) 9th edition, p. 473.

(c) 3 Dowl. P. C. 579.

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Shée, in support of the rule.—The plaintiff was not entitled to sign judgment, as no rule to plead was given after the service of the declaration. [*Parke*, B.—That objection has been waived by taking out the summonses for time to plead.] That can hardly be said to be a step in the cause, so as to constitute a waiver, as the plaintiff treated the summonses as a nullity, and did not attend. But suppose that to be a waiver, there was no notice of taxation, which was necessary in this case, where no rule to plead had been given; and the rule H. T. 4 Will 4, s. 17, only applies where the plaintiff has been regular. [*Parke*, B.—No; the rule is express on this point.]

Lord ABINGER, C. B.—It appears to me that all the grounds of irregularity have been answered; and therefore, as there is no proper affidavit of merits, the rule must be discharged with costs.

Rule discharged.

WALKER and Another v. RICHARDSON.

Where lands are already in mortmain, being vested in an ecclesiastical corporation, a lease of such lands to charitable uses is not within the statute 9 Geo. 2, c. 36.

A. having granted a lease to B. for 21 years, before the expiration of that term

granted another lease of the same premises to C. No surrender in writing of B.'s interest was shewn, but the lease granted to him was produced from A.'s custody, with the seals torn off; and it was proved to be the custom to send in the old leases to A.'s office, before a renewal was made; and which old leases were thereupon cancelled by A.'s officer:—*Held*, that this was evidence from which the jury might presume that B. had assented to the grant of the lease to C., so as to determine his interest by act and operation of law.

INDEBITATUS assumpsit, for certain tolls and duties before that time due, and of right payable, by the defendant to the plaintiffs. Plea—Non assumpsit.

The plaintiffs by their particulars claimed "the sum of 12*s.* 6*d.* for five tolls and duties, called anchorage and plankage tolls and duties, at 2*s.* 6*d.* each, due in respect of a vessel, called the *Majestic*, which in the month of July and August last, came into the River Tees, and took on board and delivered five several cargoes there."

At the trial before *Patteson*, J., at the last assizes for the county of Durham, it appeared that the plaintiffs were

the surviving lessees, under the Bishop of Durham, of the port of Stockton, and of a certain toll or duty called anchorage and plankage, claimed to be due from all ships entering the River Tees, and loading or unloading there; and the defendant was the registered owner of a steam packet called the *Majestic*, which traded between London and Middleborough, a town on the Yorkshire side of the Tees; and the question was, whether the landing-place at Middleborough, upon the Yorkshire side of the Tees, where the defendant had landed and taken in cargoes, was within the port of Stockton. The plaintiffs, in order to prove their right, put in evidence a series of old leases for the term of twenty-one years, from the Bishop of Durham to the mayor and corporation of Stockton, from the year 1820 down to and including the lease under which the plaintiffs immediately claimed, which was dated the 14th of September, 1829. These leases were demises, some of the "port or creek of Stockton," others of the "port, haven, or creek of Stockton." The lease under which the plaintiffs claimed was made between William, Lord Bishop of Durham, of the one part, and the plaintiffs and two other persons, who were since dead, of the other part, and thereby the Bishop demised the "port, haven, and creek of Stockton," and the anchorage and plankage, and all the sums of money, duties, and benefits arising or in any way growing due to him, of and from the anchorage and plankage of any ship, &c. arriving at the port, haven, or creek of Stockton, to hold the same for the term of twenty-one years, yielding and paying during the term to the Bishop and his successors the rent of 20*s*." There was then the following clause:—"And it is agreed that the premises are so demised upon trust, that the said lessees, their executors, administrators, and assigns, shall from time to time apply and dispose of the profits to arise from the above demised premises, *for the making and repairing the public streets and pavements within the borough of Stock-*

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ton, or for or towards the payment of the debts contracted on that or any other occasion, or for other public uses within the said borough, and for the public advantage and convenience thereof, in such manner as the mayor, aldermen, and burgesses of Stockton aforesaid, for the time being, from time to time to be assembled at the Courts to be held for the said borough, or the major of them, shall from time to time direct or approve." This lease had affixed to it the episcopal seal of the Bishop of Durham, was attested by one witness, and not enrolled in Chancery. It was objected on the part of the defendant, that, as the profits were to be applied to charitable purposes, the lease ought to have been attested and enrolled pursuant to the statute 9 Geo. 2, c. 36, s. 1; the learned Judge however admitted the lease in evidence, giving the defendant leave to move to enter a nonsuit upon this point.

It further appeared, that in the year 1822 the Bishop had granted a lease of the same premises for twenty-one years to two persons, named Hutchinson and Raisbeck, who had assigned that lease to the plaintiffs and the two persons whom they had survived, and that these parties had taken the above new lease of September, 1829, from the Bishop in their own names. In order to shew a surrender, the former lease of 1822 was produced from the Auditor's Office of the Bishop of Durham in a cancelled state; and it was proved, by the officer having the custody of the old leases, to be the custom, that when a new lease was granted, the old lease was sent in uncanceled, and cancelled then by the Bishop's officer. It was objected that the mere production of this lease, cancelled, from the Bishop's custody, was not sufficient evidence of a surrender of a former term; and if so, the plaintiffs had no title to maintain the action. The learned Judge, however, thought that there was sufficient evidence of a surrender. The jury having found a verdict for the plaintiffs,

Alexander, in Easter Term last, obtained a rule to shew cause why that verdict should not be set aside and a non-suit entered, or why a new trial should not be granted. Against this rule

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Creswell and *Stephen Temple* now shewed cause.—This is not a lease within the meaning of the statute 9 Geo. 2, c. 36, the objects of it not being such as are contemplated by that act. The trusts declared at the end of the lease are “for the making and repairing the public streets and pavements within the borough of Stockton, or for or towards the payment of the debts contracted on that or any other occasion, or for other public uses within the said borough, and for the public advantage and convenience thereof, in such manner as the mayor, aldermen, and burgesses shall direct or approve.” Now the trustees have an option as to the disposal of the profits, and need not necessarily apply them to any public use within the borough; they may apply them in paying the debts of the corporation, which it is submitted would not be a charitable use. It has never yet been decided that all public uses are charitable uses. The statute 9 Geo. 2, c. 36, s. 1, enacts that “no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal, whatsoever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person or persons whatsoever in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments,

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sum or sums of money other than stocks in the public funds, be and be made by deed indented, sealed, and delivered in the presence of two or more credible witnesses, twelve calendar months before the death of such donor or grantor, including the days of execution and death, and be enrolled in his Majesty's High Court of Chancery within six calendar months next after the execution thereof," &c. &c. Now, this statute does not say what shall be deemed to be a charitable use. There is here a general power to dispose of the profits as the corporation of Stockton shall direct, and they may employ it in acts of benevolence or liberality, which they may conceive to be "for the benefit and advantage of the borough." But even if this would otherwise be a charitable use, as being to be laid out for the public advantage, there is an option to apply it in paying the debts of the corporation, which would be legal, and where there is such an option the deed is not void by the statute: *Doe d. Toome v. Copestake* (a), *Morice v. The Bishop of Durham* (b). A devise of land to be laid out in either of two ways, the one legal, and the other illegal, must be laid out in that which is legal. In *Swann v. Fonnereau* (c), the Master of the Rolls says: "Then it comes within the cases of *Sorresby v. Hollins* (d), and *Grimmett v. Grimmett* (e), where trustees had an option to lay out the money in land, which would have been under the Mortmain Act, or in estates of another kind, which would have been good; and the Court held that it was not void." But it may fairly be doubted whether this lease would fall within the statute at all, as this property, being vested in the Bishop of Durham in his corporate capacity, is already in mortmain. This is a lease granted by the Bishop in his corporate capacity, and therefore not within the

(a) 6 East, 328.

(b) 9 Ves. 399.

(c) 3 Ves. 50.

(d) 9 Mod. 221; Duke, 391.

(e) Ambl. 210; Duke, 401.

statute. The statute introduces words applicable to corporations as parties *taking* property, but not as parties *granting*.

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Secondly.—There was sufficient evidence from which the jury might presume a surrender of the former lease of 1822. It was shewn that leases were renewed from time to time, and that the usage was to send in the old lease, which was thereupon cancelled by the bishop's officer, and the new lease granted: and this lease, with the seals torn off, was produced from the proper custody. The lease so cancelled was not offered in evidence as conclusive of itself of the surrender of the former term, but, coupling that with the other circumstances, it was evidence from which a surrender by operation of law ought to be presumed. It might be presumed that the former lessees had consented to the granting of a new lease to the subsequent parties, which would amount to a surrender by operation of law, just the same as if the former lessees had taken a new term: *Thomas v. Cook* (a). It was in evidence that the custom was to return the old lease to the Bishop's office before a new one was granted; and this was found in the office: then how did it get into the Bishop's hands, unless the former lessees had sent it back? This case is distinguishable from *Doe d. Courtail v. Thomas* (b), for there no new lease had been granted. [Parke, B.—Your argument would apply if the lease had not been cancelled.] Yes, but its being cancelled makes it stronger. It was also a strong circumstance, from which consent might be presumed, that the lessees of 1829 were proved to be in possession, and paying rent. And the cestui que trusts were the same under both leases.

Alexander, Addison, and Grey, contra.—It has been urged, that if the lease is good for some of the purposes

(a) 2 Starkie, 408; 2 B. & Ald. 119.

(b) 9 B. & Cress. 288; 4 Man. & Ry. 216.

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mentioned in the lease, then it is valid. The general rule, drawn from a summary of the cases, is well stated in Shelford on the Law of Mortmain, 183:—"Although a positive trust directing money to be laid out in the purchase of lands for charitable uses, is void, yet, if there be sufficient room for the Court to say that a *discretionary* power is given to the trustees to lay out the money either in the funds or in lands, the gift will be sustained; for where a testator has pointed out two modes, the one consistent with the statute, the other inconsistent with it, the Court will adopt that which is legal, and carry it into effect; but it is necessary in all these cases to see whether the testator has given such an option, and whether there is an ultimate object consistent with the statute, or not." Now here there is no such option, and no ultimate object consistent with the statute. Can it be doubted that the object was to provide for the public uses of the borough of Stockton? The words are, "for the making the public streets and pavements within the borough, or for or towards the payment of the debts contracted on that or any other occasion, or for other public uses within the said borough, and for the public advantage and convenience thereof." Now it has been decided, that where the trusts are to lay out money in paving the streets, or the like, they fall within the statute: *Roll's case* (a), *Jones v. Williams* (b). In the latter case, Lord Camden says—"The definition of charity is a gift to a general public use, which extends to the poor as well as the rich; and there are many instances of the statute 43 Eliz., carrying this idea, as for building bridges, &c." This is a trust for "a general public use," and therefore within the statute. But it is said that these lands being already in mortmain in the hands of the Bishop, the statute does not apply. The words of the 3rd section extend to such a case, inasmuch as

(a) Mod. 888; Duke, 368.

(b) Ambl. 651; Duke, 443.

they provide that all gifts, &c., "to or in trust for any charitable use whatsoever," which shall be made in any other form or manner than as by that act directed, shall be absolutely null and void. That section enlarges the preamble to the 1st section. It has been said that the only object of the statute was to prevent lands from going into mortmain; but, as stated in Shelford on the Law of Mortmain (a), "The object of that act was not to prevent alienations in mortmain; but in the first place to require the conveyances of lands to *charitable uses* to be made by deed enrolled within twelve months before the grantor's death, and to prevent devises of real property, or any interest therein, or bequest of money to be laid out in any such interest, for any charitable purposes whatever." And suppose the object to be not only to prevent alienations in mortmain, but also to give publicity to any gift or conveyance of any lands for charitable purposes, the lands being already in mortmain does not affect the question. [Alderson, B.—The statute would seem not to extend to the present case, since it speaks in the preamble of improvident alienations or dispositions made by languishing or dying persons "to the disherison of their lawful heirs," which words are not applicable to a body corporate.] It has been decided that leaseholds for a term of years are within the statute: *Attorney-General v. Graves* (b). The word "heirs" in such a case would be inapplicable, as the property would go to the executor and not to the heir. The language of the 3rd section is general, prohibiting any gift to a charitable use in any other mode than that required by the statute, and it is not controlled by the preamble to the first section. *Lord Abinger, C. B.*—The general rule is, that the preamble may extend, but cannot restrain, the effect of a particular clause; but the difficulty is in applying the statute to a case where, as here, the granting party could not make a

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(b) Ambl. 155.

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will, and the land could not be devised. *Parke, B.*—A devise to the Bishop of Durham for charitable purposes would be void, as being in mortmain; but this property is already in mortmain; then how can it be in a worse situation than it was before?] The 3rd section is general, and requires that all gifts or conveyances to any charitable use shall be absolutely void unless the forms are complied with. [*Parke, B.*—The 3rd section must be construed with reference to the enacting part of the 1st section, which refers to grants by any person or persons whatever—that extends only to grants by natural persons.]

Secondly, the mere fact of the formerlease having been found cancelled in the custody of the Bishop's officer would not amount to a surrender of the term to satisfy the Statute of Frauds (a): *Roe v. Archbishop of York* (b); *Doe d. Courtail v. Thomas* (c). The case seems scarcely to go beyond the production of the cancelled lease, and the opinion of the jury was not asked upon the point. It ought to have been shewn that there was some agreement that the present lessee should be substituted: *Stone v. Whiting* (d), *Mellows v. May* (e). In *Thomas v. Cook* (f) the assent of all the three parties distinctly appeared. Here the lease is to different parties, and there was no evidence of the consent of the prior lessee. There was no evidence except the circumstance of the former lease being found cancelled in the Bishop's office, and the usage to send in old leases before the granting of a new one, which is not sufficient to ground a presumption of consent, so as to amount to a surrender by act and operation of law.

Lord ABINGER, C. B.—This case has been very fully investigated, both here and at the trial, and I am of

(a) *Shep. Touchstone*, 301, 302.

(b) 6 East, 86.

(c) 9 B. & Cr. 299.

(d) 2 Stark. 235.

(e) *Cro. Eliz.* 873.

(f) 2 Stark. 408.

opinion that the rule must be discharged. The first question is, whether this lease is void, as not having been executed with the formalities required by the statute 9 Geo. 4, c. 36. It appears to me that this is a case not within the act, as the statute by the first section contemplates cases where there is a gift by any "person or persons," and where the property might be the subject of a devise by will, which cannot be the case here. The 3rd section does not carry the case any further, as it merely enacts that conveyances not made according to the statute, in cases which are within the statute, shall be void. This property is already in mortmain, and therefore the statute does not apply. The second objection was, that there was no evidence of a surrender of the lease granted in 1822, and therefore the plaintiffs were not entitled to recover. This objection arises upon an attempt to set up the *jus tertii* in exoneration of the defendant. It has been said, also, that the interest of the *cestuis que trust* cannot be looked at in courts of law; but in many cases their interests have been considered, and courts of law will prevent a trustee from doing anything to the prejudice of the *cestui que trust*. But it is urged that the custom of depositing old leases in the Bishop's office, from which it may be presumed that there was a surrender in this case, is not to prevail against the 3rd section of the Statute of Frauds; but all the jury are asked to presume, in order to satisfy the statute, is that the new lease was granted with the consent of the old lessees, as that would be a surrender of the former lease by act and operation of law; and we think that may well be presumed from the circumstances of this case.

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PARKE, B.—I am also of opinion that this rule must be discharged. The learned Judge reserved the question, whether this was a lease within the prohibition of the statute 9 Geo. 2, c. 36. It appears to me to be neither within

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the words nor the spirit of that act. The preamble recites, that great mischief has arisen from dispositions made *by languishing or dying persons*, to persons who would hold in perpetuity, to the disherison of their lawful heirs. Now, this is a grant by a body corporate, and not within the letter of the act; neither is it at all within the spirit, not being a grant from a private individual. If it had been a grant by other persons to trustees upon these trusts, I should have been inclined to think the lease was void, as most of the purposes to which the trust fund is to be applied are charitable trusts of a public nature, though it may be doubtful whether payment of the debts of the corporation can be so considered. The second objection is, that the legal estate in the anchorage and plankage, and tolls, was in somebody else, and therefore that the plaintiffs ought to have been nonsuited: the plaintiffs must prove their case as strictly as if they were bringing an action of ejectment for the soil. The fact of the former lease having the seals torn off, was not used in evidence as conclusive of a surrender of the former term, but merely as a circumstance fit to be considered by the jury, and I think there was evidence to go to the jury of a surrender by operation of law. Before the case of *Thomas v. Cook*, I should have had some difficulty on this point, but that is a recognised case, where the assent of the former tenant that another should hold in his place, was held to constitute as valid a surrender of the first interest by act and operation of law, as if the former tenancy had been determined in writing. Here, I think there was evidence for the jury of the consent of the first lessees, not only from the cancelling of the lease to them, but also from the user at the Bishop's office, of taking the old leases there before a new one was granted.

BOLLAND, B.—I am also of opinion that this rule ought to be discharged, and that this case is not within the sta-

tute 9 Geo. 2, c. 36. I entertained doubts as to the surrender of the former lease by operation of law, until they were removed by some of the cases that have been cited. It is clear that cancelling alone would not be sufficient, and I think no great weight is to be attached to the fact of the old lease being found cancelled in the Bishop's office; but when I find there is a custom of returning the old leases there before a renewal or re-grant, and when I look at the lease, and see who the parties are, and that the corporation of Stockton are the real parties, the only difference being that the trustees are different persons, I think there was evidence from which a jury might presume a surrender by operation of law.

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Rule discharged.

PARTRIDGE v. WALLBANK.

M*MARTIN* had obtained a rule to set aside the judgment signed by the plaintiff in this cause, for irregularity. It appeared that the plaintiff, having a demand against the defendant, proceeded in the ordinary way by writ of summons; and on the non-appearance of the defendant, sued out the ordinary distringas, requiring the defendant to enter an appearance within eight days, or the plaintiff would do so for him under the statute. To this distringas there were returns of nulla bona and non est inventus, and an appearance was accordingly entered for the defendant by the plaintiff, and judgment signed. It also appeared, that in the affidavit used to obtain the distringas, it was stated that the defendant was then abroad; and it was sworn that he had continued abroad until the present time. *Martin* contended that the distringas sued out was applicable only to cases where the defendant was in this country, and that when he was abroad, the only process enforceable by the plaintiff was that of outlawry: and that

Where it appears on the face of the affidavit used to obtain a distringas to compel appearance, that the defendant is abroad, the entry of appearance for the defendant, and judgment signed thereon, are irregular: the plaintiff ought to have proceeded by process of outlawry.

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in the form prescribed by the statute. He cited *Fraser v.*
 PARTRIDGE *Case (a)*, *Price v. Bower (b)*, *Simpson v. Lord Graves (c)*,
 WALLBANK. *Jones v. Price (d)*.

Sir *W. Follett* shewed cause, and urged, that the Judge's order for the distringas being in general terms, the plaintiff had a right to sue out either kind of process upon it: *Fraser v. Case*. But—

PARKE, B., was clearly of opinion that the proceedings were irregular.

Rule absolute, with costs (*e*).

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| (a) 9 Bing. 464; 1 Dowl. P. C. 725. | (d) Id. 42. |
| (b) 2 Dowl. P. C. 1. | (e) See <i>Reay v. Youde</i> , ante, 188; <i>Vere v. Gower</i> , 4 Bing. N.C.; 4 Scott, 287. |
| (c) Id. 10. | |

IN THE EXCHEQUER CHAMBER.

(In Error.)

Sir MOLYNEUX HYDE NEPEAN, Bart. *v.* DOE d. KNIGHT.

When a party has been absent seven years without having been heard of, the presumption of law then arises that he is dead; but there is no legal presumption as to the time of his death.

By the statute 3 & 4 Will. 4, c. 27, ss. 2, 3, the doctrine of non-adverse possession is done away with, except in the cases provided for by s. 15; and an ejectment must be brought within twenty years after the original right of entry of the plaintiff (or of the party under whom he claims) accrued, whatever be the nature of the defendant's possession.

- (a) 5 B. & Ad. 86; S. C. nomine *Doe d. Slade v. Nepean*, 2 Nev. & M. 219.

shire Spring Assizes, 1835, when the following evidence was given on the part of the plaintiff:—

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2d January, 1788.—At a Court held this day for the manor of Loders, Matthew Knight took of the lord certain copyhold tenements called the Roofless Living and Home Living, (being part of the premises in question in this cause), to hold to him the said Matthew Knight and Edward Knight (his brother), and Elizabeth Mary Davies, for their lives, and for the life of the longest liver of them, successively.

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16th October, 1794.—At a Court held this day, the said Matthew Knight took of the lord a certain copyhold tenement called Mabys Hay, (being other part of the premises in question), to hold to him the said Matthew Knight and Rice Davies Knight his son, for their lives, and the life of the longest liver of them, successively, in reversion immediately after the determination of the estate of Henry Budden therein.

20th March, 1797.—At a Court held this day, George Bagster and Nathaniel Taylor, as assignees of the said Matthew Knight, a bankrupt, were admitted tenants to the said tenements called Roofless Living, Home Living, and Mabys Hay, except out of the latter as to one close called Sheep Acres, to which they were admitted tenants in reversion of the said Henry Budden.

At the same Court, George Knight took of the lord the reversion of the said tenements called Roofless Living and Home Living, to hold to Paul Slade Knight (the lessor of the plaintiff) and Thomas Clothier Knight, sons of the said George Knight, for their lives, and the life of the longest liver of them, successively, after the determination of the estate and interest which the said George Knight claimed to have for the life of the said Matthew Knight his brother.

And at the same Court, there was entered a letter of attorney, dated 13th March, 1797, whereby the said

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George Bagster and Nathaniel Taylor appointed Richard Travers their attorney, to take admittance of the said tenements called Roofless Living, Home Living, and Mabys Hay, together with the said close called Sheep Acres, and to surrender the same to the use of the said George Knight, his executors, administrators, and assigns, for the life of the said Matthew Knight.

In August, 1806, Thomas Clothier Knight died. In December in the same year, or early in 1807, Matthew Knight went to America; and in the month of May 1807, a letter was received from him, but he was never heard of afterwards.

Matthew Knight was in possession of the premises in question for the three years preceding his bankruptcy, which happened in 1797; and after that event George Knight entered into possession of the same premises as the purchaser of Matthew Knight's interest, and continued in such possession till his death; but he was never actually admitted tenant to the lord.

On the 1st of August, 1807, George Knight executed an indenture of mortgage to the said Richard Travers, of all the said premises, for the term of seventy years if the said Matthew Knight should so long live, for securing the payment of two several sums of 838*l.* and 375*l.* Soon after the date of this mortgage, all the premises were sold to Sir Evan Nepean, the father of the defendant in this action (the plaintiff in error), but the purchaser was never admitted tenant to the lord; and if any formal conveyance was executed, it had been lost.

On the 12th December, 1807, George Knight died.

On the 6th April, 1808, Sir Evan Nepean granted a lease of the premises to the said Richard Travers for the term of fourteen years from this date, and Travers underlet the premises to George Way, who occupied them from the death of the said George Knight in 1807, to the death of Travers in 1813. Shortly after Travers's death, the pre-

mises were surrendered by his executors to Sir Evan Nepean, who continued in possession thereof by himself or his tenants, from thence until his death in 1822: and from that time to the present the defendant, Sir Molyneux Nepean, has been in the possession thereof.

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Upon these facts, two questions were raised at the trial: first, whether it was incumbent on the lessor of the plaintiff to prove that the said Matthew Knight was actually alive within twenty years next before the commencement of the action; secondly, whether it appeared upon the evidence that there had been an adverse possession of the premises against the lessor of the plaintiff, for twenty years before the action brought. The learned judge stated his opinion to the jury as to the first point, that it was incumbent on the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years, and that he had not proved it; and as to the second point, that if Sir Evan Nepean took as purchaser of the interest of George Knight, then his possession had not been adverse for twenty years, because it could not be adverse so long as it was uncertain whether Matthew Knight was alive or dead, which it was up to May 1814. The jury found that Matthew Knight was not proved to have been actually alive within twenty years next before the commencement of the action, but that it did not appear by the evidence that there had been an adverse possession of twenty years as against the lessor of the plaintiff; and the verdict was thereupon entered for the plaintiff.

The lessor of the plaintiff excepted to the opinion of the learned Judge on the first point, and the defendant to his opinion on the second point, and cross bills of exceptions were tendered and sealed accordingly, and writs of error sued out thereon. The case was argued in last Michaelmas Vacation by

Sir *W. W. Follett*, for the plaintiff in error.—The lessor of the plaintiff, in order to sustain the action, was

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bound to prove both his right of property in the premises and his right of entry. To make out these, it became incumbent on him to shew—first, that Matthew Knight was dead; and secondly, that the title fell on him in remainder within twenty years before the commencement of the action: therefore he was bound to prove the death of Matthew Knight within twenty years before action brought. It was contended for the lessor of the plaintiff, that, by analogy to the statute against bigamy, 1 Jac. 1, c. 11, s. 2, and the statute 19 Car. 2, c. 6, as to estates pur autre vie, the presumption of the death of Matthew Knight did not arise until the expiration of seven years after he was last heard of: in other words, that he must be presumed to have lived to the end of those seven years. This is in effect, as to this point, a writ of error from the judgment of the Court of King's Bench (*a*), which decided that there was no legal presumption at all as to the *time* of his death. It is not necessary, therefore, to refer again to the authorities cited on that occasion; but a case has been since decided, in which the same doctrine was re-stated. In *Rex v. Inhabitants of Harborne* (*b*), on an appeal against an order of removal of a female pauper, the respondents having proved her settlement by marriage, the appellants shewed that the husband had been previously married, and that a letter had been written by his first wife, bearing date twenty-five days before the second marriage, from Van Diemen's Land. The Sessions having on this evidence quashed the order of removal, the Court of King's Bench held that they were warranted in so doing, for they might presume that the first wife was living at the time of the second marriage. *Rex v. Twynning* (*c*) had been cited as an authority to the contrary. Lord Denman, C. J., says (*d*): "I must take this opportunity of

(*a*) 5 B. & Ad. 93; 2 Nev. & M. 341.

M. 225.

(*c*) 2 B. & Ald. 386.

(*b*) 2 Ad. & E. 540; 4 Nev. &

(*d*) 2 Ad. & E. 544.

saying, that nothing can be more absurd than the notion that there is to be any rigid presumption of law on such questions of fact, without reference to accompanying circumstances: such, for instance, as the age or health of the party. There can be no such strict presumption of law. In *Doe d. Knight v. Nepean* the question arose much as in *Rex v. Twynning*. The claimant was not barred, if the party was presumed not dead till the expiration of the seven years from the last intelligence. The learned judge who tried the cause held that there was a legal presumption of life until that time, and directed a verdict for the plaintiff; because, if there was a legal presumption, there was nothing to be submitted to the jury. But this Court held that no legal presumption existed, and set the verdict aside. . . . I think the only questions in such cases are, what evidence is admissible, and what inference may fairly be drawn from it." There is another case, which was not referred to on the argument in the Court of King's Bench—*Patterson v. Black (a)*. There, in an action on a policy of insurance on the life of one Macleane, from the 30th January, 1772, to the 30th January, 1778, it appeared in evidence, that about the 28th of November, 1777, Macleane sailed from the Cape of Good Hope in the Swallow sloop of war, which, not being afterwards heard of, was supposed to have been lost in a storm off the Western Islands. In order to prove the death of Macleane before the 30th of January, 1778, the plaintiff called witnesses to prove the ship's departure from the Cape, and several captains swore that they sailed the same day; that the Swallow must have been as forward in her course as they were on the 13th or 14th of January, when they encountered a most violent storm; and that she was much smaller than their vessels, which weathered it with difficulty. Lord Mansfield left it to the jury to say, whether,

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under all the circumstances, they thought the evidence sufficient to convince them that the party died before the expiration of the time limited in the policy: adding, that if they thought it so doubtful as not to be able to form an opinion, the defendant ought to have their verdict. There would be many cases in which such a presumption as that which is contended for would materially affect the title to land, and would yet be altogether contrary to the fact. The courts have therefore invariably said, that there is no presumption as to the *time*, although there is as to the *fact*, of the death. Here no *evidence* whatever was given to shew the time of the death.

But it is said, and the learned judge so expressed his opinion, that, as Sir Evan Nepean took as purchaser from George Knight, his possession was not adverse so long as it was uncertain whether Matthew Knight was alive or dead, that is, not until the end of the seven years. But the *certainty* of his death does not exist even now, although the courts may presume it if legal proceedings are taken. The presumption then made is this, and no more,—that he died *at some time* within the first seven years, during which he has not been heard of. It is altogether immaterial that Sir Evan Nepean's possession was not adverse to Matthew Knight, the tenant for life; the moment he died, the possession became adverse to his remainderman. The right of entry accrues to the remainderman, under such circumstances, as soon as he has a right to treat the party in possession as a trespasser—that is, immediately on the death of the tenant for life. The question is therefore identical with the former—when, namely, did the death of the tenant for life occur? The statutes of limitation themselves contain no reference to the doctrine of adverse possession, which has been engrafted by the courts upon the statute 21 Jac. 1, c. 16. That statute simply enacts, “that no person or persons shall make any entry into any lands, &c., but within twenty

years next *after his or their title, which shall first descend or accrue to the same*, and in default thereof such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made." In the case, then, of the tenancy of a particular estate, with an estate of remainder, when does the remainder-man's title accrue to him? Undoubtedly at the death of the tenant of the particular estate. Suppose Matthew Knight died in 1808, had not the remainder-man full right then to enter? The question is not whether the remainder-man acquiesced in a continuance of the possession under the tenant for life; that would be a question for the jury. The recent act for the limitation of actions, 3 & 4 Will. 4, c. 27, does not alter the case. The 2nd section enacts, that after the 31st December, 1833, "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." And the 5th section declares, that when the estate or interest claimed shall have been an estate or interest in reversion or remainder, such right shall be deemed to have first accrued at the time when it became an estate or interest in possession. Here the right of entry accrued, and the estate vested in possession, on the death of the tenant for life. The whole case, therefore, resolves itself into the same question which was determined by the Court of King's Bench—when did that death happen? No doubt some acts of the party in remainder may prevent the possession under the tenant for life from being adverse to himself, as in the case of a void lease for years by the tenant for life,

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and receipt of rent under it by the remainder-man: *Re d. Brune v. Prideaux (a)*, *Denn v. Rawlings (b)*; and so of other acts shewing a recognition of the continuance of possession; but if no such act be shewn, the occupation is adverse from the death of the tenant for life. If the possession here was not adverse, Sir Evan Nepean was tenant to Paul Slade Knight, otherwise there has been a disseisin. If any such presumption could arise, it was for the jury; but it could not, because Sir Evan Nepean was clearly claiming in his own right, at all events from the death of Matthew Knight. The doctrine of adverse possession was adopted on the principle that the *right of entry did not accrue* until the occupation of the land became no longer permissive, as in the case of landlord and tenant, or of trustee and cestui que trust. So, in the case of a joint tenancy or tenancy in common; though each party has a right to come upon the land, he has no right of entry to make a demise to the exclusion of the other party. So also the mortgagor, being in possession with the consent of the mortgagee, in whom the legal estate is vested, is his tenant: *Partridge v. Bere (c)*, *Hall v. Doe d. Surtees (d)*. Here it is clear there was no occupation by the consent of the remainder-man. In *Doe d. Parker v. Gregory (e)*, where a widow, tenant for life of lands settled upon her by a deceased husband by way of jointure, married again, and levied a fine of the lands jointly with her second husband, and died, and the husband held for more than twenty years after her death, it was held that his possession was adverse against the reversioner after her death, although he had originally come into possession lawfully, because he could have been treated as a trespasser immediately on the wife's death. Suppose it were necessary to plead the Statute of Limitations specially, what

(a) 10 East, 158.

(b) Ibid. 261.

(c) 5 B. & Ald. 604.

(d) 5 B. & Ald. 687.

(e) 2 Ad. & E. 14; 4 Nev. & M. 308.

would the party have to prove under it?—that his *right of entry accrued* within twenty years. The question, therefore, whether the possession was adverse to the tenant for life or not, is immaterial; since the plaintiff's right of entry accrued, and his estate vested in possession, on the death of the tenant for life. If, on the other hand, the question as to adverse possession has reference to a possession adverse as against the remainder-man only, that was a question for the jury; but there was no fact from which to infer that it was permissive.

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The *Attorney-General*, contra.—The consequence of determining both the points in this case against the lessor of the plaintiff will necessarily be, that his time for bringing an ejectment is abridged to thirteen years instead of twenty. He could not bring it until the end of seven years after May 1807: if he had laid his demise earlier than May 1814, he must have inevitably failed on this evidence, because the presumption of the *fact* of the death had not yet arisen. The plaintiff is, however, it is submitted, entitled to judgment on both points.

First, as to the question of adverse possession:—This case does not fall within the statute 3 & 4 Will. 4, c. 27. The enactments of that statute had for their object to get rid of the uncertainty as to the law of adverse possession, which formed so great an impediment in the tracing of titles. But the 15th section saved this case from the operation of the previous sections, giving the further period of five years, during which the doctrine of adverse possession was to remain as before. [*Patteson, J.*—That is where the possession was not adverse at the passing of the act.] It is retrospective through the whole past period, and gives five years more for the purpose of bringing ejectment. Then, how did this case stand under the old law? Matthew Knight, the tenant for life, having become bankrupt, his assignees convey his interest to George

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Knight; he mortgages to Travers, and Travers assigns his mortgage to Sir Evan Nepean, who becomes possessed of the equity of redemption as well as of the mortgage term. Sir Evan Nepean, therefore, represents George Knight, who represents Matthew. Then with regard to the actual possession: George Knight occupied the premises till December, 1807; Way (the tenant under Travers) succeeded, and held till 1814; then came in the tenant of Sir Evan Nepean. It might be contended that, at the time when the 3 & 4 Will. 4, c. 27 passed, there had been no adverse possession at all. Where the possession is at first lawful by the party's entering in his own right, it does not become unlawful by his continuance in possession after the period when he is in possession by right. In *Doe v. Gregory*, the husband did not pretend to hold under his wife: he did not come in lawfully by right. [*Patteson, J.*—The whole of that case is, that there may be an unlawful possession which does not amount to a disseisin.] There must be an *ouster*, an intention to disseise, otherwise there is no disseisin; and it has been always held that the statute of 21 Jac. 1, does not begin to run until after an ouster or disseisin. The most familiar example is where there are two sons, and the younger enters and keeps possession; the statute does not run against the elder unless he is actually ousted or disseised: *Reading v. Royston* (a). In *Doe d. Burrell v. Perkins* (b), tenant for life leased for her life, and died in 1799, and the lessee continued in possession without payment of rent till his death in 1805, when his son took possession, and continued without payment of rent, and in 1807 levied a fine with proclamations: it was held that the remainder-man in fee might maintain ejectment against him without an actual entry to avoid the fine, or a notice to determine the tenancy. Lord *Ellenborough* said, "In

(a) Salk. 423.

(b) 3 M. & Selw. 271.

order to constitute a title by disseisin, there must be a wrongful entry; but here has been no wrongful entry, but only a wrongful continuance of the possession, therefore there was no disseisin." [*Patteson*, J.—The point of *adverse possession*, as distinguished from disseisin, did not arise there, because the ejectment was brought within twenty years of the death of the tenant for life.] But the doctrine laid down went to the extent that it might have been brought even beyond the twenty years; the validity of the fine depended on the question, whether the possession was adverse or not; and it was held that neither by right nor by wrong the conusor had anything in the premises. The case is altogether at variance with the argument on the other side, that the Statute of Limitations always begins to run from the time when the original right of entry accrues. The same general doctrine, that where the original entry is lawful, the mere continuance of possession does not make it adverse, is laid down in many other cases: *Hall v. Doe d. Surtees* (a), *Doe d. Colclough v. Hulse* (b), *Doe d. Souter v. Hull* (c), *Doe d. Smith v. Pike* (d), *Doe d. Roffey v. Harbrow* (e). The case of *Doe d. Forster v. Scott* (f), which was cited at the trial as an authority the other way, turned merely on the construction of a grant of copyholds. On these authorities, if Sir Evan Nepean entered rightfully, as the purchaser of Matthew Knight's life estate, without any intention to disseise, his continuance in possession did not make the statute begin to run. There would be no pretence for considering George Knight's possession adverse, if he himself had held over; and all the others have come in

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(a) 5 B. & Ald. 687; 1 Dowl. M. 385.
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(b) 3 B. & Cr. 757; 5 Dowl. & M. 422.

(c) 2 Dowl. & R. 38.

(d) 3 B. & Ad. 738; 1 Nev. &

(e) 3 Ad. & E. 68, n.; 1 Nev.

& M. 422.

(f) 4 B. & Cr. 706; 7 D. & R. 190.

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under him. And if the possession of Sir Evan Nepean was the possession of Knight, it followed as a conclusion of law, that it was not a case of adverse possession, and there was nothing to be left to the jury. Nor *could* Sir Evan's possession be adverse, that is, as claiming by an adverse title, during the seven years while it was uncertain whether Matthew was dead. It is clear he believed him alive in 1808, when he was treating for his life interest; and it is equally clear he never set up any pretence to hold adversely to the remainder-man.

Secondly.—It is submitted that the ordinary presumption of law is, that a party lives *during* the period of seven years after he was last heard of. That presumption may be rebutted by circumstances: as by proof that the party was aged, or infirm, or exposed to extraordinary peril; and will subsist only in the absence of any circumstances to rebut it. Thus, in *Patterson v. Black*, there was a storm, and probable shipwreck. *Watson v. King* (a) is not in point, because Lord *Ellenborough* there proceeded on the rule adopted in insurance law, that a vessel proved to have sailed, and not to have been heard of for several years, may be considered as lost; and there is no other decision to support the judgment of the Court of King's Bench in the present case. [*Vaughan* n, B.—Is not the presumption rather that life endures through the seven years, than that it expires within the seven years, according to *Doe d. George v. Jesson* (b).] Lord *Ellenborough* there laid it down, that “the presumption of the duration of life, with respect to whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living.” It is most convenient that such a definite period should be fixed; it draws the line distinctly, and prevents confusion; and the analogy with the several statutes by which such a period is limited

(a) 1 Stark. N. P. C. 121.

(b) 6 East, 80.

is then complete. *Against* the lessor of the plaintiff, the presumption is that Matthew Knight lived seven years from May 1807; *for* him, the presumption is that he lived no longer. If it be otherwise, this absurdity follows: if this ejectment had been brought within twenty years from May 1807, it is admitted it might have been sustained; but if it had been brought within *seven* years from that period, the plaintiff must have been nonsuited. The law presumes that the party lives seven years, therefore the action cannot be brought sooner: and that he died at the end of seven years, therefore it may be brought within twenty years after. The demise might be laid the very day after the expiration of the seven years, but not earlier. The question is, is not the same presumption to be made as to the limitation, as is made as to the commencement, of the action? [*Patteson, J.*—It does not appear to me to be a matter of *analogy* merely to the stat. of 19 Car. 2, c. 6; that seems to me to be the governing statute on this very subject.] That statute enacts, that where cestui que vies shall absent themselves by the space of *seven years together*, they shall be accounted as naturally dead—that is, at the expiration of the seven years. [*Coleridge, J.*—The preamble shews that the inconvenience to be remedied was only the inability to prove the death.] *Rex v. Inhabitants of Harborne* (a) is distinguishable; it only shews that the law will presume that life continues for twenty-five days. [*Patteson, J.*, referred to *Rex v. Twynning* (b).] There were conflicting presumptions; but the Court admitted the existence of the presumption that life continues for seven years. The dicta of the judges, and the convenience of the case, are in favour of the decision now contended for: because otherwise the period of limitation will inevitably be abridged in all such cases to thirteen years; and what in-

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(a) 2 Ad. & E. 540; 4 Nev. & M. 341.

(b) 2 B. & Ald. 386.

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convenience is there, on the other hand, in holding that such a presumption shall stand until the contrary is proved? [Lord *Denman*, C. J.—Is it quite clear that the late statute does not apply?] It does not apply for two reasons: first, it is retrospective; secondly, this possession was not adverse. The right construction of s. 15 is, that five years are given if the party needs it. [*Patteson*, J.—The direction I meant to give was, that at all events the possession was not adverse until the presumption of the fact of death arose; I certainly should not have taken upon myself to decide, without leaving it to the jury, that there had been no adverse possession at all.]

THE COURT (Sir *W. Follett* not being present) called on

Barstow, in reply.—The argument on the other side ranges itself under two heads:—First, whether the onus of proving the time of the death lay on the lessor of the plaintiff; secondly, whether he has satisfied it or not. The test of the first point is, by supposing a plea putting in issue whether the plaintiff's right accrued within twenty years or not. He must prove all the facts which are necessary to make out his affirmative. At what point does the Attorney-General say the possession became wrongful? It must be so at the time of ejectment brought; but he says it was rightful at first. The argument goes to the extent that the possession has never been adverse at all; if so, the ejectment cannot be maintained at all. The cases cited on the other side are distinguishable. *Reading v. Royston* need not be disputed; because adverse possession for twenty years is evidence of an ouster or disseisin. In *Doe v. Perkins*, the fact of an *adverse possession* is not stated at all; the case did not turn on the Statute of Limitations, but on the effect of a fine, and no sufficient time had elapsed from which to infer a disseisin. The distinction was there taken between a disseisin and adverse possession. It may be that the

defendant has no title; but the question also occurs, whether the plaintiff has a right to bring his action, not being barred by the lapse of time. *Hall v. Doe d. Surtees* proceeded altogether on the peculiar condition of mortgagor and mortgagee, which is an anomalous case, and cannot aid the argument on any other question. In *Doe d. Colclough v. Hulse*, the sole consideration was, whether, under the circumstances, the possession was adverse until the death of a particular party, the ejectment being brought within twenty years after that event. Here it is agreed that the right dates from the death; but the difficulty is to fix the death. In *Doe d. Souter v. Hull*, all that the Court decided was, that under the circumstances it was a case of tenancy by sufferance, and not of adverse possession at all. So also in *Doe d. Roffey v. Harbrow*, the adverse possession was negatived by the particular facts of the case. But the present case *does* fall within the 3 & 4 Will. 4, c. 27, and is not within the exception in s. 15, which applies only where the possession was not previously adverse. And the plaintiff must prove positively that he is not barred by the lapse of time, and has no right, by a *prima facie* case, to shift the onus to the other party.

With respect to the other question, there is no sufficient authority for the existence of the presumption that life endures for seven years. Even if the question be doubtful, the conclusion must be against the lessor of the plaintiff. In the cases referred to, relating to insurance, the precise *time* of the death was not material: if the action had been brought more than six years after the sailing of the ship, and there had been a plea of the Statute of Limitations, those cases would have been analogous. In *Doe v. Jesson*, it was put to the jury to fix the *time* as well as the fact of death, and they fixed it within a period which excluded the seven years, and answered the purposes of the cause. The whole question is, is there any

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absolute presumption of law—can it be stated as a legal proposition that the Court must, independently of particular circumstances, infer that life endures for the seven years and then expires? The necessity for the statutes referred to shews that there was no such rule at common law; and the 19 Car. 2, c. 6, only supplies the proof of the *fact* of death.

Cur. adv. vult.

In Trinity Vacation, the judgment of the Court was delivered by

Lord DENMAN, C. J.—The lessor of the plaintiff claimed as grantee in reversion of a copyhold estate, on the death of Matthew Knight. Matthew Knight went to America in December 1806, or early in 1807, and the last account that was heard of him was by a letter written by him from Charleston, which was received in England in May, 1807. The declaration in this cause was served on the 18th January, 1834. At the trial, evidence was given to shew that the defendant came into possession as a purchaser of the interest of George Knight, who held for the life of Matthew Knight.

Two questions arose. First, whether the lessor of the plaintiff was bound to give some evidence as to the precise time of Matthew Knight's death, in order to shew that he had brought this action within twenty years of his death, or whether the presumption of his being alive continued to the last moment of the seven years since he was last heard of, when the law presumes that he was dead, and which *was* within twenty years next before the commencement of the action. Secondly, whether, on the supposition that the defendant came in as a purchaser of George Knight's interest, there had been twenty years' adverse possession as against the lessor of the plaintiff.

The learned Judge told the jury it was incumbent on

the lessor of the plaintiff to prove that Matthew Knight was actually alive within twenty years before the commencement of the action, and that he had not proved that fact by merely shewing that seven years since he was last heard of expired within twenty years next before the commencement of the action: on which the counsel for the lessor of the plaintiff tendered a bill of exceptions. The learned Judge also told the jury, that if they were of opinion that the defendant took as purchaser of the interest of George Knight, his possession had not been adverse for twenty years, because it could not be adverse as long as it was uncertain whether Matthew Knight was alive or not, which it was up to May, 1814. Upon this the counsel for the defendant tendered a bill of exceptions. The jury found that it was not proved that Matthew Knight was alive within twenty years, but that it did not appear that there was an adverse possession of twenty years; and under the learned Judge's direction, they found their verdict for the lessor of the plaintiff.

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It seems the statute of the 3 & 4 Will. 4, c. 27, was not adverted to at the trial, but only on the case being argued before the Court. We are all clearly of opinion that the second and third sections of that act (which came into operation on the 1st of January, 1834, seventeen days before this action was commenced) have done away with the doctrine of non-adverse possession, and except in cases falling within the fifteenth section of the act, the question is whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession. The right of entry in this case accrued on the death of Matthew Knight. Then, as the first and second questions were identical, the learned Judge was wrong in putting any distinct and separate question to the jury on the nature of the possession, unless the case be within the fifteenth section.

Now, that section applies only where the possession was not adverse, according to the former state of the law,

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at the time of the passing of the act—that is, the 24th July 1833. If that point had been raised at the trial, it is plain the jury would have been satisfied that the possession was adverse on the 24th July, 1833, for we know by the report of *Doe d. Knight v. Nepean*, that an action had been brought and tried between the same parties some time before that date. Whether, therefore, the learned Judge took a right view of the defendant's possession or not, under the former state of the law, is immaterial; the 3 & 4 Will. 4, c. 27, applies to the case, and the direction in respect of which the defendant's bill of exceptions was tendered was therefore wrong.

Still, it is necessary to determine the first and principal point in the case, because, if the learned Judge's direction was also wrong as to that, the lessor of the plaintiff would be entitled to retain the verdict, although he obtained it on another ground. The Court is therefore called on to review the decision of the Court of King's Bench in *Doe v. Nepean*. The doctrine there laid down is, that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or the end of any particular period during those seven years; that if it be important to any one to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was last heard of.

After fully considering the argument at the bar, we are all of opinion that the doctrine so laid down is correct. It is conformable to the provisions of the statute of James I. relating to bigamy, more particularly to the statute 19 Car. 2, c. 6, relating to this very matter, the words of which distinctly point at the presumption of the *fact* of death, but not at the *time*: it is conformable also to decisions on questions of bigamy and on policies of insur-

ance, and it is supported and confirmed by the case of *Rex v. Inhabitants of Harborne*. It is true, the law presumes that a person shewn to be alive at a given time remains alive until the contrary be shewn, for which reason the onus of shewing the death of Matthew Knight lay in this case on the lessor of the plaintiff. He has shewn the death, by proving the absence of Matthew Knight, and his not having been heard of for seven years, whence arises, at the end of those seven years, another presumption of law, namely, that he is not then alive; but the onus is also cast on the lessor of the plaintiff of shewing that he has commenced his action within twenty years after his right of entry accrued, that is, after the actual death of Matthew Knight. Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of has been occasioned by his death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time *before* the expiration of the seven years.

It is true, the doctrine will often practically limit the time for bringing the action of ejectment in such cases; and circumstances may be supposed, as of a lease for seven

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years commencing on the death of A., or of a promissory note payable two months after A.'s death, and many other cases which might be put, in which it would be difficult to carry into effect certain contracts, or to have remedies for the breach of them, if the parties interested, instead of making inquiry respecting the person on whose life so much depended, chose to wait for the legal presumption. Such inconveniences may no doubt arise, but they do not warrant us in laying down a rule that the party shall be presumed to have died on the last day of the seven years, which would manifestly be contrary to the fact in almost all instances. No such rule is enacted by the statute, nor is any one authority adduced in which any such rule has been laid down.

It is not necessary to make any election between the beginning of seven years and the end of them, and the period to which the death should be referred, as seems at one time to have been assumed. We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.

For these reasons, we are of opinion that the learned Judge's direction to the jury, in respect of which the lessor of the plaintiff tendered a bill of exceptions, was correct, and that the verdict ought to have been found for the defendant; but as we cannot order it to be so entered, the result is that the verdict found for the lessor of the plaintiff must be set aside, and a venire de novo awarded.

Venire de novo awarded.

AN

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TO THE

PRINCIPAL MATTERS.

ACCOUNT STATED.

A. kept cash with B., a banker, and the balances to his credit were stated from time to time in a pass-book. A. became a lunatic, but the account continued to be kept with his family, and in the pass-book, the entries in which were in B.'s handwriting, a balance was stated to the credit of A.:—*Held*, that this was not evidence to support a count on an account stated with A., in an action brought by his representative against B., to recover the amount of such balance. *Tarbut v. Bispham*.

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ACTION ON THE CASE.

See PLEADING III., 2, 3.
SEDUCTION.

I. *By whom Maintainable.*

In case, the declaration stated, that L., the father of the plaintiff, bargained with the defendant to buy of him a gun, to wit, for the use of himself and his sons; and the defendant then, by falsely and fraudulently warranting the gun to have been made by N., and to be a good, safe, and secure gun, then sold the gun to L.,

for the use of himself and his sons, for 24*l.*; whereas in truth and in fact the defendant was guilty of great breach of duty, and of wilful deceit, negligence, and improper conduct, in this, that the gun was not made by N., nor was a good, safe, and secure gun, but on the contrary thereof, was made by a very inferior maker to N., and was a bad, unsafe, ill-manufactured and dangerous gun, and wholly unsound and of very inferior materials; of all which the defendant, at the time of such warranty and sale, had notice: and that the plaintiff, knowing and confiding in the said warranty, used the gun, which but for the warrant he would not have done: and that the gun being in the hands of the plaintiff, by reason and wholly in consequence of its weak, dangerous, and insufficient construction and materials, burst and exploded: whereby the plaintiff was greatly wounded, &c., and wholly by means of the premises, breach of duty, and improper conduct of the defendant, lost the use of his hand:—*Held*, (after verdict for the plaintiff on the plea of not guilty, and on other pleas denying the warranty, and that

the gun was unsafe, &c.), that the action was maintainable. *Langridge v. Levy*, 519

II. Against whom Maintainable.

A. borrowed of B. a horse and chaise, and went in it, accompanied by C., on an excursion of pleasure, C. driving. By C.'s mismanagement, the horse and chaise were driven against and injured the plaintiff's horse:—*Held*, that an action on the case might be maintained for the injury against A., on a declaration charging that he was possessed of and driving the horse and chaise, and that by his negligent driving the injury was occasioned. *Wheatley v. Patriek*, 650

ADVERSE POSSESSION.

By the statute 3 & 4 W. 4, c. 27, s. 3, the doctrine of non-adverse possession is done away with, except in the cases provided for by s. 15; and an ejectment must be brought within twenty years after the original right of entry of the plaintiff (or of the party under whom he claims) accrued, whatever be the nature of the defendant's possession. *Nepean v. Doe d. Knight*, 894

AGREEMENT.

Effect of Alteration in.

By agreement dated 8th September, the defendant agreed to let a house to the plaintiff for seven years, at an annual rent, payable quarterly, the first payment to be made on the 25th March following:—*Held*, that a quarter's rent only became due on the 25th March.

By an agreement between the plaintiff and defendant, a house, No. 38, was let to the plaintiff. After the agreement was executed and delivered to the plaintiff, it was altered (it was not proved by whom) by writing 35

ARBITRATION.

instead of 38, on an erasure. The house occupied by the plaintiff under the agreement was in fact No. 35:—*Held*, that the altered agreement might be given in evidence in an action for an excessive distress (in which the demise was admitted on the record), to shew the terms of the holding. *Hutchins v. Scott*, 809

ARBITRATION.

See PLEADING.

I. *Extent of Arbitrator's Authority.*

A client sued his attorney for negligence and bad advice, and also for money had and received to his use. To the counts for negligence, the defendant pleaded the statute of limitations; to the money counts a set-off for bills of costs. At the trial, the Judge having expressed an opinion that the statute of limitations was a bar to the plaintiff's recovering on the counts for negligence, at his suggestion the pecuniary accounts between the parties were referred to a barrister, and a juror was withdrawn. By the order of reference, the arbitrator was to settle all matters in difference between the parties touching the defendant's bills of costs, and all the plaintiff's demand on the defendant, with power to have the defendant's bills taxed; and to ascertain the balance between the parties, and direct by and to whom, and when, the same should be paid; but no question of liability was to be raised. The arbitrator directed the defendant's bills to be sent for taxation, and in the meantime the plaintiff discovered that the defendant was not admitted in the Courts at Westminster (but only in the Court of Great Session in Wales), where a considerable part of the business was done, and he raised that objection before the arbitrator. The arbitrator, by his award, after stating

that he had heard, examined, and considered the proofs, &c., of the parties, and had admitted and considered the evidence tendered to shew the several times when the defendant was admitted in the superior Courts, awarded that the balance due from the defendant to the plaintiff was 170*l.* and a fraction, and directed the defendant to pay that sum to the plaintiff. On motion to set aside the award, on the ground that the arbitrator had exceeded his authority in making any deductions in respect of the defendant's non-admission in the superior Courts, there were conflicting affidavits as to whether the liability in this respect was in the contemplation of the parties at the time of the submission. The Court, however, set aside the award; and on a subsequent motion, stayed the proceedings in the cause, on the ground that the withdrawal of a juror, under the circumstances, finally determined the action. *Harries v. Thomas*, 32

II. Enlargement of Time.

Where a cause was referred to two arbitrators, with power to them to appoint a third, the award to be made by a day named, or such other day as they or any two of them should appoint, and the two originally named enlarged the time for making the award before they appointed the third:—*Held*, that this was an invalid enlargement, and that the award made by the three could not be enforced by attachment. *Reade v. Dutton and others*, 69

III. Award.

(1). Construction of.

To an action of assumpsit on a builder's bill, the particulars of demand being 104*l.* 12*s.*, the defendant pleaded payment of 30*l.* before action brought, and payment into Court of 45*l.* more. The cause was referred at

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Nisi Prius to a surveyor, who was to measure and value the plaintiff's work, and to certify for whom and for what amount the verdict should be entered; no order of Nisi Prius being drawn up. He certified that he was of opinion that 74*l.* 7*s.* was a fair and proper sum to be paid to the plaintiff:—*Held*, that this amounted to a verdict for the defendant.

The Court refused to set aside the certificate, on the ground that it was made some months after the jury process was returnable, the plaintiff not having withdrawn from the reference on that ground. *Salter v. Yates*, 67

(2). Certainty of.

Where a verdict was taken for the plaintiff, subject to a reference of the cause and all matters in difference, the arbitrator having power to vacate the verdict or reduce the damages, and he awarded that the plaintiff was entitled to demand of the defendant 90*l.* in respect of the causes of action, and that the defendant was entitled to set off 35*l.* in respect of his journeys, &c. mentioned in the plea and notice of set-off, and that the defendant should deliver up certain securities to the plaintiff:—*Held*, that the award sufficiently ascertained the amount for which the verdict was to be entered.

A rule for delivering the *postea* to the plaintiff, that he might enter the verdict pursuant to the award of an arbitrator, may be drawn up on reading the affidavit "and the *paper writing* thereunto annexed," provided the affidavit verify the *paper writing* as being the copy of the award. *Platt v. Hall*, 391

ATTACHMENT.

See WITNESS, 1.

I. When granted.

An attachment may be said to be *granted*, when the rule for the attach-

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ment is obtained, and after that the proceedings are on the *crown* side of the Court, and affidavits in the matter are properly intitled *Rex v. The Sheriff of ———*. *Rex v. The Sheriff of Middlesex, in a Cause of Barton v. Morgan*, 107

II. When to stand as Security.

Whenever it appears, on the discussion of a motion to set aside a regular bail-bond or attachment, that the plaintiff has been prevented from trying his cause by the irregularity of the defendant's proceedings, he is entitled to have the bail-bond or attachment stand as a security, although it appear that the rule to set it aside might have been disposed of in time to allow the plaintiff to enter and try his cause at the regular time. *Casley v. Binns*, 285

III. Contempt, when waived.

The warden of Dover Castle having returned cepi corpus to a writ of capias, a rule to bring in the body was served, which expired on the 28th of November. A notice of justification of bail was given on the 6th of December, which the plaintiff's attorney returned, saying that the body rule had expired, and the warden was in contempt. Two subsequent notices were given, and the plaintiff's attorney attended on each occasion, and after protesting that the proceedings were irregular, opposed the justification of bail:—*Held*, that this was no waiver of the warden's contempt, and that the plaintiff was afterwards in a condition to move for an attachment. *Smith v. Andrews*, 536

ATTORNEY.

See EVIDENCE, 2.

INTERPLEADER ACT.

I. Privileges of.

The privilege of an attorney de-

AUCTIONEER.

fendant to be sued in his own Court is not taken away by the Uniformity of Process Act, 2 Will. 4, c. 39. *Lewis v. Kerr*, 226

II. Bill.

1. Where a Judge's order had been obtained on the application of one of two plaintiffs to have the bill of the plaintiffs' attorney taxed on his undertaking alone, the Court set aside the order, it having been obtained on the ordinary affidavits.

Quære, whether such an order might have been supported, had it been obtained on a special application, so as to give the parties an opportunity of answering the facts alleged. *Hobby and Another v. Pritchard*, 124

2. An attorney will not be allowed, on taxation of costs, a charge for more than one letter before action brought, under any circumstances. *Capel v. Staines*, 850

III. Practising in another's Name.

It is no ground for disallowing the plaintiff's attorney the costs of a cause, in which the plaintiff has recovered a verdict, that he is not on the roll of attorneys of this court, if it appears that the London agent's name is indorsed on the record and proceedings, and he has conducted all the business in court, and corresponded with the country attorney on the subject of the suit. *Jones v. Jones*, 323

AUCTIONEER.

All matters in difference between G. and H. were referred, by a Judge's order, to arbitration, and an agreement of reference was entered into between them, in which H. was described as the administrator of A., to whom certain leasehold premises, the right to which was in dispute, had belonged. The arbitrator directed

the premises to be sold by an auctioneer, whose appointment was assented to by both parties. G.'s attorney, who, at the time of the sale, was aware that H. had not taken out administration, became the purchaser, and paid a deposit to the auctioneer, it being understood at the time of sale, that H. would take out administration. H., however, afterwards refused to do so, and a good title was not made out:—*Held*, that the purchaser was entitled to recover his deposit from the auctioneer, without notice of the contract having been rescinded. *Duncan v. Cafe*, 244

BAIL.

See ATTACHMENT, 2, 3.

I. Affidavit of Justification.

All affidavits of justification of bail must comply with the form prescribed in the rule of Hilary Term, 2 Will. 4, s. 19; but if the bail justify in person, a variance from the form is no objection to their passing, but only disentitles the defendant to the costs of justification. *Stevens v. Miller*, 368

II. Notice of Justification.

(1). By Prisoner.

Where the defendant is a prisoner, and two days' notice of bail is given, the notice must state that the defendant is a prisoner. *Poole's Bail*, 312

(2). Of added Bail.

The rule of Trinity Term, 1 Will. 4, s. 1, does not apply to the case of added bail, so as to require, in such case, four days' notice of justification. *Key v. M'Intyre*, 347

(3). Form of.

A notice of justifying bail at

chambers must state the hour of attendance.

But though the notice be irregular, in not stating the hour, yet the plaintiff is not at liberty to treat it as a nullity, and commence proceedings on the bail-bond before the four days have expired, as the defendant may be rendered within that time. *Smith v. Webb*, 879

III. Justification.

1. Bail (at least town bail) may justify in person, where there has been an insufficient affidavit of justification. *Shave v. Spode*, 42

2. Notice of justification of bail having been given, the plaintiff delivered a declaration de bene esse, to which the defendant demurred. The plaintiff, after ineffectual attempt to have the demurrer set aside as frivolous, obtained an order to join in demurrer:—*Held*, that, after this, the bail could not be opposed, nor could they justify. *Bolton v. Johnson*, 42

IV. Proceedings on Bail-bond.

Where a defendant, having had notice on the 16th of May of actions having been commenced on the bail-bond, applied on the 26th of May (being the fourth day of term) to set aside the proceedings:—*Held*, that the application was not too late. *Smith v. Webb*, 879

BANKRUPTCY.

I. Payment by Bankrupt, when protected.

A delivery of goods, bonâ fide made in part payment of a previous debt, after a secret act of bankruptcy committed by the debtor, is a payment protected by the 82nd section of 6 Geo. 4, c. 16. *Cannan v. Wood*, 465

II. Fraudulent Preference.

A banking firm was in insolvent circumstances, and about to stop payment. A., a partner in the firm, informed B. of the fact, in order that the private balance of C., B.'s father, might be drawn out of the bank; but desired him not to let it be known to D., a shareholder in an insurance company which also had an account with the bank, as he, A., did not wish the directors to know of it. C.'s private balance was in consequence drawn out the next day. On the evening of that day A. informed C. of the state of the house. C., being a managing director of the insurance company, took measures by which the company's account was drawn out by a cheque upon the bank. Two days afterwards the house stopped:—*Held*, that this was not a fraudulent preference of the insurance company. *Belcher v. Jones*, 258

III. Petitioning Creditor's Debt.

An I. O. U., bearing date before the bankruptcy of a trader, constitutes no evidence of a petitioning creditor's debt, without some proof that it was in existence before the bankruptcy. *Wright v. Lainson*, 739

IV. Petitioning Creditor, Competency of.

Semble, that where, in an action against a sheriff for a false return to a *fi. fa.*, he sets up as a defence the bankruptcy of the debtor, the petitioning creditor is a competent witness for the defendant. *Ibid.*

V. Election to prove Debt.

A plaintiff, to bring himself within the 59th section of the 6 Geo. 4, c. 16, must either prove his debt, or have his claim entered on the proceedings under the commission. *Augarde v. Thompson*, 617

VI. Examination of Bankrupt.

Where a bankrupt, being in the custody of the marshal in execution for debt, on his being brought up before the Subdivision Court of the commissioners for examination, was by that court committed, for not answering satisfactorily, to the custody of the keeper of Newgate, and the keeper of Newgate delivered him to the messenger, who redelivered him to the custody of the marshal, the court refused to grant a writ of habeas corpus to bring up the bankrupt on the ground that he had satisfactorily answered the questions. *Ex parte Knight*, 106

VII. Official Assignee.

The official assignee in bankruptcy is not within the protection of the 6 Geo. 4, c. 16, s. 44, and is not therefore entitled to notice of action by the alleged bankrupt for seizing his goods under the fiat. *Knight v. Turquand*, 101

BASTARD.

Where a party paid money to parish officers, to exonerate him from all charges and expenses that might occur from a bastard child, affiliated on him, and the child died during the same year, whilst they continued in office:—*Held*, that an action for money had and received was maintainable against those parish officers, to recover the money not expended in maintaining the child, although they had since quitted office, and handed over the money to their successors.

Semble, also, that the whole sum so paid was money had and received to the plaintiff's use, from the time it was so paid, as the contract was, from the beginning, illegal and void. *Chappell v. Poles*, 867

BILLS AND NOTES.

See LIMITATIONS, STATUTE OF, 1.
PLEADINGS, I. 4, 6; III. 9.
STAMP, 1.

I. *Property in.*

If a party authorized be the holder of a bill of exchange to get it discounted, and to apply the proceeds in a particular way, does get it discounted, but misapplies any part of the proceeds, he cannot be sued in trover for the bill, but must be sued for money had and received. *Pulmer v. Jarmain*, 282

II. *Notice of Dishonour.*

1. A bill of exchange, indorsed in blank, was left by the indorsee at the office of R., an attorney, to be presented by him. On being presented by R., it was dishonoured. R. wrote to the drawer on the following day, describing the bill, and stating that it was dishonoured, and subscribed his name and residence to the letter:—*Held*, a sufficient notice of dishonour, though he did not state on whose behalf he applied, or where the bill was lying. *Woodthorpe v. Lawes*, 109

2. A person, sent by the holder of a dishonoured bill of exchange, called at the drawer's house the day after it became due, and there saw his wife, and told her that he had brought back the bill that had been dishonoured. She said she knew nothing about it, but would tell her husband of it when he came home. The party then went away, not leaving any written notice:—*Held*, sufficient notice of dishonour. *Housego v. Cowne*, 348

3. A notice of the dishonour of a promissory note was in these words:—"Sir, I am desired by Mr. H. to give you notice that a promissory note, dated August the 10th, 1835, made by S. T. for 99l. 18s., payable to your order two months after date thereof, became due yesterday, and

has been returned unpaid. I have to request you will please to remit the amount thereof, with 1s. 6d. noting, free of postage, by return of post:—*Held*, a sufficient notice of dishonour. *Hedger v. Steavenson*, 799

III. *Actions on.*(1). *Pleadings.*

1. In an action on a bill of exchange by indorsee against acceptor, the defendant having obtained an inspection of the bill, pleaded pleas, denying acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 Will. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die. The court struck out the last plea. *Dawson v. Macdonald*, 26

2. In an action on a banker's cheque, the court refused leave to add a plea (the time for pleading having expired) that it was drawn by the defendant more than fifteen miles from the place where it was made payable, and falsely dated, in contravention of the 9 Geo. 4, c. 49, s. 15. *M'Dowall v. Lyster*, 52

3. To an action against the defendant as indorser of a bill of exchange, he pleaded that "he did not make or draw the bill of exchange as in the declaration alleged:—"*Held*, that the plaintiff was not entitled to treat this plea as a nullity, and sign judgment as for want of a plea. *Allen v. Walker*, 317

4. *Semble*, that in a count on a bill or note no promise to pay need now be alleged. At all events, the omission cannot be taken advantage of except on special demurrer. *Griffith v. Roxbrough*, 734

5. If an executor declares on a bill or note payable to his testator, laying a promise to pay him (the executor), such promise may be denied by a plea of non-assumpsit, notwithstanding the new rules. *Timmis v. Platt*, 720

(2). *Against whom maintainable.*

Three persons carried on business as partners, under the firm of J. B. & Son: two of the partners died, and the surviving partner employed the defendant, who had previously acted as a clerk to the firm, to wind up the affairs. In this character the defendant attended the warehouse, and transacted business with different parties on account of the firm. Under these circumstances, the defendant, using and signing the name of the firm, drew upon J. H., a debtor to the firm, a bill of exchange, which J. H. accepted:—*Held*, that the defendant was not liable as the drawer in an action *upon the bill*, his name not being affixed to it, without some proof that he had no authority to draw bills in the name of the firm, or that he had not acted *bonâ fide*.

Quære, whether, if it had been proved that he had no such authority, he would have been liable in an action *upon the bill*. *Wilson v. Barthrop*, 863

(3). *Proof of Consideration.*

Assumpsit by indorsee against maker of a note. Plea, that the note was given for a gaming debt, and indorsed to the plaintiff with notice thereof and without consideration. Replication, that the note was indorsed to the plaintiff without notice of the illegality, and for a good and sufficient consideration; on which issue was joined:—*Held*, that, on these pleadings, the illegal making of the note was not so admitted as to render it necessary for the plaintiff to give any evidence of consideration; but that, in order to compel him to do so, the defendant ought to have proved the illegality by evidence. *Edmunds v. Groves*, 642

IV. *Discharge of.*(1). *By substituted Bill.*

To a declaration by the indorsee

against the maker of a promissory note for 420*l.*, the defendant pleaded, that, after it became due, he gave the plaintiff, and the plaintiff received from him, two bills of exchange for 210*l.* each, *to take up the note, and in lieu thereof*: that the defendant was a party to the bills, and liable thereon to the plaintiff, and that they were not due, and were outstanding in the plaintiff's hands. The defendant gave in evidence a memorandum, signed by the plaintiff, stating that the defendant had given him two bills for 210*l.* each, to take up the note for 420*l.*; and it appeared that one of the bills was overdue and unpaid at the commencement of the action:—*Held*, that it was a question for the jury whether the bills were given in lieu of and satisfaction for the note, or only to gain time for payment; if the former, it was a defence to the action, although the defendant did not prove the latter allegation of the plea; if the latter, it was no defence, unless he proved that both the bills were outstanding at the commencement of the action. *Goldsmith v. Goodee*, 20

BRIBERY.

See MUNICIPAL CORPORATION ACT, 1.

BROKER.

See PRINCIPAL AND AGENT, 2.

CANAL ACT.

By the act of Parliament, 9 Geo. 4, c. 98, the undertakers of the Aire and Calder Navigation were empowered to make (among other works) a navigable cut or canal from the river Calder, to communicate with the river at another point, and also to construct a railroad from such cut to the highway between Leeds and Wakefield; and, for such purposes, to enter

upon any lands, &c., making satisfaction as thereafter mentioned; and it was provided, that in case of any disputes or differences between the undertakers and the parties interested in the lands, &c. taken, used, damaged, or affected by the execution of any of the powers of the act, a jury should be summoned in manner therein directed, who should assess and ascertain the sum or sums of money to be paid for the purchase of such lands, &c., and also what other separate and distinct sum or sums of money should be paid by way of recompence, either for the damages which should or might before that time have been sustained as aforesaid, *or for the future temporary or perpetual continuance of any recurring damages* which should have been occasioned as aforesaid, and the cause or occasion of which should have been only in part obviated or repaired by the undertakers, and which could or would be no further obviated, repaired, or remedied by them. Other clauses provided that the company should agree for, or cause to be valued and paid for, the lands, &c. which they were empowered to purchase, within five years after the passing of the act; that they should not deviate above 100 yards from the parliamentary line, and that they should complete all their works within fifteen years.

A dispute having arisen as to the value of a piece of land in which the contemplated railroad crossed the line of an existing railroad, a jury was summoned pursuant to the act, who assessed the value and damages as follows: Value of the land, 6*l.*; present damages, 0; future damages, 2800*l.* At this time the undertakers had contracted or paid for all the lands required for their works, but had not executed the works between the termini laid down in the parliamentary map, and had deviated above

100 yards from the parliamentary line, and made a cut through land of their own:

Held, first, that that part of the verdict which assessed the future damages was void; for that, in order to enable the jury, under the act of Parliament, to make an assessment of future damages, the cause of injury must already exist in some work of the undertakers already done.

Secondly, that unless the undertakers had *finally abandoned* the intention of making the cut in the parliamentary line, they had a right, at any time within the fifteen years, to take possession of the land in question, on payment or tender of the 6*l.* assessed as its value, and that they had a right to go on simultaneously with the making both of the cut and of the railroad. *Lee v. Milner*, 824

CARRIER.

See PLEADING, III, 3.

CONTRACT.

I. *Construction of.*

1. In an agreement whereby the defendant contracted with the guardians of a union to supply bread for the use of the poor, he covenanted to supply at a certain price loaves of a certain weight, and the guardians agreed to pay for every quantity of the loaves supplied according to the contract, of which a bill of particulars should be sent with the articles at the time of this delivery, or within a month afterwards: provided, that if the articles should not be of the quality contracted for, or should be deficient in weight, or should be delivered without a bill of particulars, the guardians should be at liberty to return them, and purchase others, charging the defendant with the expense and difference of price. In

debt on bond given for the due performance of this contract, the breaches assigned were, first, that the defendant delivered loaves deficient in weight, as and for loaves of a particular weight; the issue on which was, that the defendant delivered them as being of the weight stated;—secondly, that he did not deliver a bill of particulars with such loaves, whereupon the board of guardians returned them, and purchased a fresh supply in their place, and thereby incurred expenses, which the defendant did not make good. To this breach the defendant pleaded, that the delivery of a bill with the loaves had been dispensed with by the agent of the board duly authorized, on which allegation issue was taken. It appeared that the defendant brought a quantity of loaves to the door of the workhouse in a cart, and the relieving officer desired to weigh such of them as the defendant would bring out for that purpose. Some of the loaves were accordingly taken into the premises and weighed, and being found deficient in weight, the guardians refused to receive any of the loaves, and they were replaced in the cart, and all taken back by the defendant:—*Held*, that this was a sufficient delivery to satisfy the terms of the first issue.

Held, secondly, that the latter breach was well assigned, and the issue thereon (being found for the plaintiffs) material; the guardians having by the contract the option of returning the bread, unless a bill of particulars were sent *with* it, or of dispensing with that, and of suing the defendant unless he sent a bill *within a month*. *Elliott v. Martin*, 13

2. Assumpsit for work done under the following agreement:—“Mrs. E. agrees with Mr. B. to cleanse the cesspools to the 13 houses in S. street for 8*l.* 2*s.*; Mr. H.’s rent-

balance to be deducted from the said sum.” H. was a weekly tenant to the defendant of one of the houses. The agreement was signed in the middle of one of the weeks of his tenancy. At that time 2*l.* was due from him for rent; but when the work was completed, another week’s rent had become due. The Judge, at the trial, having expressed an opinion that the *rent-balance* meant the amount due when the agreement was signed, and the verdict having been found accordingly, the Court refused a new trial. *Edwards v. Bagster*, 221

3. In an action on an agreement for the sale of goods, at a valuation to be made by A., the issue was, whether a valuation was made by A. It appeared that the goods were in fact valued by B., A.’s clerk:—*Held*, that the defendant was not bound by it, unless it were shewn that it was agreed between the parties that B.’s valuation should be taken as A.’s; and that the fact of the defendant’s seeing B. valuing, and making no objection until B. told him the amount, was not evidence of such agreement. *Ess v. Truscott*, 385

II. Running with the Land, what is

A landlord who had demised certain premises for 21 years by deed, at the rent of 230*l.*, agreed to enlarge the buildings, the lessees agreeing to pay 10 per cent. additional on the outlay. The buildings were accordingly made, and the lessees subsequently became bankrupt, and their assignees took possession of the premises:—*Held*, in an action for use and occupation brought against the assignees, that this was a collateral agreement, and not a contract running with the land, upon which the assignees were liable. *Lambert v. Norris*, 333

CONVICTION.

See GAME ACT.

COSTS.

See COURT OF REQUESTS' ACTS.
PLEADING, VIII.
STATUTE, 1.

I. *Of several Issues.*

Assumpsit for work and labour, &c. Pleas, first, except as to 15*l.* 18*s.* 7*d.*, non assumpsit; second, as to 52*l.* 12*s.*, parcel, &c., payment; third, as to 52*l.* 12*s.*, other parcel, &c., that the work was done on a special contract, subjecting the plaintiff to a deduction for certain damage, and that such damage amounted to that sum; fourthly, as to 20*l.*, other parcel, &c., a set-off; and fifth, payment into Court of 15*l.* 15*s.* 7*d.* Issues being joined on the four first pleas, the verdict was found for the plaintiff on the general issue for 73*l.* 18*s.* 10*d.*; on the second issue, for the defendant; on the third, for the defendant as to 20*l.*; and on the fourth, for the defendant as to 5*l.* 6*s.*—*Held*, that the defendant was entitled to the general costs of the cause. *Probert v. Phillips*, 40

II. *On nolle prosequi.*

To a declaration in assumpsit for money had and received, the defendant pleaded, as to all except 3*l.* 5*s.*, non assumpsit; as to all except 3*l.* 5*s.*, a set-off; and as to 3*l.* 5*s.*, payment of that sum into Court. The plaintiff, by his replication, admitted the set-off, and replied that he would not further prosecute his suit, except as to the 3*l.* 5*s.*, and took that sum out of Court:—*Held*, that the defendant was entitled to his costs on the two first issues. *Goodce v. Goldsmith*, 202

III. *Treble Costs.*

A parish officer sued in trespass for distraining for poor rates, is not entitled, under the 43 Eliz. c. 6, s. 19, or 13 & 14 Car. 2, c. 12, s. 20, to treble costs, when the plaintiff is nonsuited. *Charrington v. Meatheringham*, 142

IV. *Under 43 Geo. 3, c. 46.*

Quære, whether a defendant, who has been arrested and imprisoned on meane process, and is discharged in consequence of a defect in the affidavit to hold to bail, can be said to be "arrested and held to special bail," within the meaning of the 43 Geo. 3, c. 46, s. 3.

In an action by the indorsee against the acceptor of a promissory note for 100*l.*, he pleaded that, by agreement between him and the drawer, the note was not to be enforced except on certain terms, which the drawer had not complied with; and that the plaintiff had received the note without consideration. The plaintiff entered a nolle prosequi as to all the amount except 49*l.*, for which he had given value to the drawer, and had a verdict for that sum. It did not appear that the plaintiff was cognizant of the agreement between the defendant and the drawer:—*Held*, that the defendant, who had been arrested for the whole amount of the note, was not entitled to costs under the 43 Geo. 3, c. 46, s. 3. *Edwards v. Jones*, 414

V. *Certificate under 43 Eliz. c. 6.*

To a declaration for a libel, the defendant pleaded the general issue, and two special pleas. At the trial the jury found all the issues for the plaintiff, with 1*s.* damages, and the judge certified under the 43 Eliz. c. 6, s. 2:—*Held*, that the plaintiff was not entitled to the costs of the issues found for him, notwithstanding the

rule of H. T. 4 W. 4, s. 7. *Simpson v. Hurdiss*, 84

VI. Demand of.

The demand of costs on the Master's allocatur by the attorney in the cause, they being costs in the cause, is sufficient whereon to ground an attachment. *Cox v. Salmon*, 127

VII. Taxation.

1. When a copy of the bill of costs and affidavit of increase has not been delivered with the notice of taxation, as required by rule 10 of M. T. 1 Will. 4, the taxation is irregular, unless the other party waives the objection by attendance or otherwise; and the Court will set it aside. *Wilkins v. Perkins*, 315

2. Where a plaintiff discontinues, not having given notice of trial, the defendant is not, under any circumstances, entitled to the costs of the drafts or copies of the briefs. *Doe v. Neale*, 732

3. A notice of taxation of costs is unnecessary where the defendant has not appeared. *Pope v. Mann*, 881

COURT OF REQUESTS' ACTS.

See MIDDLESEX COURT OF REQUESTS.

Where final judgment is signed in vacation, the defendant may apply to the Court in the following term for a suggestion, under a Court of Requests Act, to entitle him to costs, on condition of paying the plaintiff's costs accrued since the judgment was signed. *Heale v. Erle*, 383

COVENANT.

On Lease not executed by Covenantee.

A declaration in covenant stated that one J. H. was seised in fee, and being so seised, by a certain indenture, with

COVENANT, &c.

the consent and approval of the said J. H. then given, made between the said J. H. of the one part, and the defendant of the other part, (profert, sealed with the seal of the defendant,) it was witnessed, that, for the considerations therein mentioned, he, the said J. H., did demise to the defendant, his executors and administrators, certain premises therein mentioned; to hold to him, his executors, &c., for the term of eleven years. By virtue of which said indenture, and by permission of the said J. H., the defendant afterwards entered into the premises, and was possessed thereof. That J. H. afterwards made his will, by which he devised the estate to his widow E. for life, remainder to the plaintiff for life. It then averred the death of J. H., and afterwards of E., his wife, whereupon the said plaintiff became and was seised of the reversion of and in the premises in his demesne as of freehold for the term of his natural life, under and by virtue of the will. The defendant pleaded in effect that, although the deed was his deed, yet that it was not signed by J. H., nor by any agent of the said J. H. thereunto lawfully authorized by writing, nor was any lease for the said term of eleven years put into writing and signed by J. H., or any agent, &c.:—*Held*, on demurrer, that the action was not maintainable by the plaintiff against the defendant for breaches of the covenants in the indenture. *Cardwell v. Lucas*, 111

COVENANT TO STAND SEISED.

Ejectment.—One A. D. L., being seised of a part of certain lands, and one A. L., her daughter, seised of another part, executed a deed of settlement previous to the marriage of A. L. the daughter with R. D., dated the 15th November, 1822, by

which, after reciting that A. D. L. and A. L. were respectively entitled to several parts of the premises, and that a marriage was intended to be had between R. D. and A. L., it was witnessed, that in consideration of 2*l.* to the said A. D. L. paid by the said R. D., and for and in consideration of the said intended marriage, and also in consideration of 10*s.* to each of them the said A. D. L. and A. L. by L. L. and D. D. in hand paid, they the said A. D. L. and A. L., and each of them, did grant, bargain, sell, alien, enfeoff, and confirm unto the said L. L. and D. D., their heirs and assigns, (the premises in question), to hold unto them the said L. L. and D. D., their heirs and assigns, upon the trusts thereafter mentioned, viz., to the use of the said R. D. and his assigns for life, with divers remainders over. The indenture was duly executed by A. D. L., A. L., and R. D., and the marriage took effect soon after the execution of the deed, and R. D. had possession of the premises up to the time of the trial, in July 1836. The deed had indorsed upon it a memorandum of livery of seisin, but no names were subscribed to it, nor was any direct evidence given of livery of seisin having been made, nor was it shewn that L. L. and D. D. (the trustees) were in any way related to the settlors. A. D. L. died in 1831, and A. L. in 1835:

Held, that this deed operated as a covenant to stand seised, and that a good use passed to R. D., the husband.

Seemle, that possession for a less period than 20 years is not sufficient to leave to the jury for them to presume that livery of seisin has been made. *Doe d. Lewis v. Davies*, 502

CROWN.

See INFORMATION OF INTRUSION.

CUSTOMS' ACTS.

Licences granted by the Commissioners of Customs to custom-house agents, under the 6 Geo. 4, c. 107, s. 139, and bonds taken for the faithful performance of their duties, are continued in force by the 3 & 4 Will. 4, c. 53, s. 144, notwithstanding the repeal of the former act by 3 & 4 Will. 4, c. 50. *Rex v. Atkins*, 289

DEATH (PRESUMPTION OF).

When a party has been absent seven years without having been heard of, the presumption of law then arises that he is dead; but there is no legal presumption as to the time of his death. *Nepean v. Doe d. Knight*, 894

DEVISE.

1. A testator, by will dated in March 1807, devised to trustees (not using words of inheritance) all his lands in B., on trust to permit his wife to enjoy them for her life, and after her decease, on trust out of the rents and profits to pay his brother an annuity of 10*l.* for five years, if he should so long live. The testator then devised a house to John Gord, the son of George Gord; another to George Gord, the son of George Gord; and a third (after the expiration of certain life estates) to George Gord, the son of Gord. He bequeathed also legacies amounting in the whole to 65*l.*, George Gord and John Gord, the sons of George Gord, being two of the legatees, the legacies to be paid by the trustees when the legatees should attain the age of twenty-one years; and he appointed his wife sole executrix:—*Held*, that evidence of the testator's declarations was admissible to shew that he intended that the house devised to "George, the son of Gord," should go to George, the son of George Gord:—*Held*, also, that the trustees

took a chattel interest in the devised lands, either until the legacies were paid, or until the legatees had all attained twenty-one.

If, in ejectment by a devisee, it is objected at Nisi Prius that the legal fee is in trustees named in the will, but the Court is of opinion that they took a *chattel interest*, the defendant will not be allowed to avail himself of this objection, so as to have a new trial, inasmuch as, if the objection had been correctly stated at the trial, the plaintiff might have removed it by shewing that the chattel interest was determined. *Doed. Gord v. Needs*, 129

2. J. S., being seised in fee of freehold estates, and absolutely entitled to leasehold estates under a lease granted to himself, devised the freehold to his wife, C. S., in fee, and the leasehold also to her, "during the lives of J. and D. S.," and, if they should survive her, to her heirs. C. S., by her will, devised all her property to trustees (without words of inheritance), on the trusts therein mentioned. She then bequeathed to them the lands she held under J. S.'s will, to pay an annuity to M. D. for her life. She also bequeathed to W. J. a legacy of 10*l.*, and to C. J. and E. J., her grand-nieces, certain yearly sums, until and during their period of apprenticeship. She then appointed the trustees her executors, and directed that after all her debts were paid, the residue of her personal and real estate should be equally divided between her said two grand-nieces. C. S. died in 1799, and the two grand-nieces entered, and received the rents of the whole property, subject to the annuity. In 1814, E. J. married, and in 1815 died, after having had a child, which also died. Upon her death, the defendant entered into possession, and received the rents of her moiety. The annuity to M. D. ceased to be payable in 1804; the legacy to W. J. was paid in 1812.

In ejectment brought by the husband of E. J. for her moiety of the freehold and leasehold estates:—*Held*, that, under the will of C. S., the legal fee in the freehold estates vested in the trustees, and that a re-conveyance could not be presumed.

Held, also, that the lessor of the plaintiff, not having shewn that the lease to J. S. was not a lease for lives to him and his heirs, had not made out any title to a moiety of the leasehold estates. *Doed. Rees v. Williams*, 749

DISTRESS.

A landlord's broker went to the tenant's house and pressed for payment of rent alleged to be due, and 3*l.* 3*s.* for expenses of the levy, but touched nothing, and made no inventory. The tenant paid him the rent and expenses under protest, on which he withdrew. In an action against the landlord for an excessive distress:—*Held*, that the defendant could not say there had been no actual distress. *Hutching v. Scott*, 809

EJECTMENT.

See ADVERSE POSSESSION.

I. Service.

In ejectment, service of the declaration on a servant of the tenant on the premises, is, of itself, insufficient to entitle the plaintiff even to a rule nisi for judgment against the casual ejector. *Doed. Lord Dinorben v. Roe*, 374

II. Appearance.

It is not necessary in this court to enter an appearance for the casual ejector previously to signing judgment by default in ejectment, and the costs of doing so will not be allowed. *Doed. Morgan v. Roe*, 423

EVIDENCE.

See BANKRUPTCY.

BILLS AND NOTES, III.

DEVISE, I.

INCLOSURE ACT, 2.

PLEADING, III., 2.

I. *On whom Affirmative of Issue.*

The plaintiff sued the defendant for the breach of an agreement to re-take of him a public-house, (which the plaintiff had previously taken from the defendant), and to pay for the goodwill, stock, &c., provided C. & Co., the owners of the house, would accept the defendant as a tenant; and the declaration alleged that the defendant did not ask C. & Co. to accept him as their tenant, or make any effort to cause them to do so. This allegation the defendant denied by his plea, and issue was joined thereon. The plaintiff called the managing clerk of C. & Co., who proved that the defendant made application by letter for the house, in answer to which a personal interview was required; the defendant made no further application himself, but his brother-in-law made inquiries on his behalf, to which a similar answer was returned. The witness stated also that C. & Co. would not have let the house, except at an increased rent. On this evidence the plaintiff was nonsuited, and the Court held that the nonsuit was right. *Jefferies v. Clare*, 43

II. *Confidential Communication.*

Trover for a lease by the assignees of a bankrupt.—Plea, that before the bankruptcy the bankrupt deposited the lease with the defendant as a collateral security for money which the bankrupt then owed him. At the trial, the plaintiffs attempted to shew that the lease was deposited after the act of bankruptcy, and for that purpose called a witness, who had been

the attorney for the bankrupt after the act of bankruptcy, and had been applied to by him to raise him money. It was then proposed to ask him whether the bankrupt had not the lease in his possession at that time:—*Held*, that this was privileged from disclosure, as being a confidential communication made to him relative to his character as an attorney. *Turquand v. Knight*, 98

III. *Secondary Evidence.*

1. A cheque, drawn on account of a parish, was delivered to A., who was then the paying clerk of the parish. It was shewn that the bankers of the parish, on the same day, paid a sum of that amount, and that their custom was to return the cancelled cheques to the paying clerk, and that they were deposited in an apartment in the workhouse. A. having gone out of office, application was made to his successor at that place for inspection of the cheques. He handed to the witness several bundles, which he searched, without finding the cheque in question:—*Held*, a sufficient search to let in secondary evidence of its contents. *M'Gahey v. Alston*, 206

2. In an action of trover against the sheriff, for goods seized under a fi. fa., the warrant of seizure was not produced, nor any notice given to produce it. It was proved that the officer who made the seizure had put his son into possession, and given the warrant to him; the son stated that he believed he returned it either to his father or to the sheriff's office. The officer said that it was his custom to deliver the warrants to the auctioneer, that they might be transmitted with the auction sheet to the excise office, through the supervisor of excise for the district; that he had searched his own papers for it, and had inquired for it at the sheriff's office. A search

was also proved among the auctioneer's papers, and at the excise office; but the supervisor was not called, nor any search of his papers proved:—*Held*, that reasonable proof was given of the loss of the warrant, so as to let in secondary evidence of its contents, in order to connect the sheriff with the officer. *Minshall v. Lloyd*, 450

IV. Of Acts of Ownership.

Where, in trespass qu. cl. fr., the plaintiff claimed the whole bed of a river flowing between his land and the defendant's, the defendant contending that each was entitled ad medium filum aquæ:—*Held*, that evidence of acts of ownership exercised by the plaintiff upon the bed and banks of the river on the defendant's side, lower down the stream, and where it flowed between the plaintiff's land and a farm of C., adjoining the defendant's land,—and also of repairs done by the plaintiff to a fence which divided C.'s farm from the river, and was in continuation of a fence dividing the defendant's land from the river,—was admissible for the plaintiff. *Jones v. Williams*, 326

EXECUTORS AND ADMINISTRATORS.

1. When, on a rule nisi, calling upon executors to account for and pay over legacy duties, the executor does not appear to shew cause, and the rule is therefore made absolute, the Court ordered that in future, in such cases, it should form part of the rule, that if, upon the delivery of the accounts, there should be found to be any duties payable to his Majesty, that the executor or administrator should pay the costs of the Crown, to be taxed in the usual manner. *In Re Robinson*, 407

2. An executor, after payment of all the debts of which he had notice, invested certain parts of the residue of the testator's personal estate remaining in his hands, in the funds, in his own name, received the dividends, and paid them over to the legatees in satisfaction of their legacies given by the will:—*Held*, that under these circumstances, the executor could not sustain a plea of plene administravit to an action brought against him, fifteen years after the testator's death, for a specialty debt of the testator, of which he had had no notice. *Smith v. Day*, 684

FIXTURES.

In 1824, A. leased to B. for 21 years a colliery, with the right of putting up steam-engines, &c. &c., for working it, subject to a proviso for re-entry on non-payment of rent or insolvency. B. erected on the colliery several steam-engines, affixed in the ordinary way to the soil, and afterwards, in 1827, assigned the colliery, with the engines, implements, &c. in use upon it, to trustees, in trust to permit B. to enjoy them until default in payment of an annuity granted by him; and on such default to take possession, and sell them and pay the arrears. In June, 1829, A. recovered possession of the premises in ejectment brought in pursuance of the proviso for re-entry. In November, 1829, the engines and other articles on the colliery were seized under a fi. fa., at the suit of an execution creditor of B.:—*Held*, that the trustees could not recover the steam-engines in trover against the sheriff:—*Held* also, that the omission of the trustees to take possession on B.'s default in payment of the annuity, did not avoid the assignment. *Minshall v. Lloyd*, 450

FOREIGN JUDGMENT.

FOREIGN JUDGMENT.

The first count of a declaration in *assumpsit* was on a bill of exchange drawn by the plaintiffs upon and accepted by the defendant in Scotland. The second count, after stating the drawing and acceptance of the bill (which was more than six years before the commencement of the action), set forth at length the making and registering of a protest of non-payment in the Court of Session in Scotland, and the issuing and execution of letters of horning and poinding on the defendant, charging him to make payment of the amount of the bill and interest to the plaintiffs, according to the law of Scotland, and his default thereto; and alleged that, by virtue of the several premises, the defendant became liable to pay the plaintiffs the amount of the bill, with interest; and being so liable, promised to pay the same:—*Held*, that this latter count did not disclose a sufficient cause of action as upon a *judgment* in Scotland.

The particulars stated the action to be brought to recover the amount of the bill mentioned in the first count, with interest, and that the plaintiffs would rely on the whole or any part of the declaration for the recovery thereof:—*Held*, sufficient to entitle the plaintiffs to proceed on the second count. *Hay v. Fisher*, 722

FRAUDS, (STATUTE OF).

1. Where a party had purchased, by a verbal contract, a growing crop of grass, with liberty to go on the close wherein it grew, for the purpose of cutting and carrying it away:—*Held*, that he could not maintain trespass against the seller for taking away his horse and cart from the close, which he had brought there for the purpose of carrying away the grass; for that this was, in substance, an action charging the defendant on the

FRAUDS (STATUTE OF). 931

contract, within s. 4 of the Statute of Frauds.

A contract for the sale of an interest in land, without a note in writing, may operate as a *license*, so as to excuse the entry of the purchaser on the land, but it cannot be made available in any way as a *contract*. *Carrington v. Roots*, 248

2. The traveller of the plaintiffs, hop merchants in London, agreed with the defendant, at Leeds, for the sale to him, by sample, of a quantity of hops. The defendant wrote in his own book, which he kept, the following memorandum:—“Leeds, 19th Oct. 1836. Sold John Dodgson (the defendant) 27 pockets Playsted 1836, Sussex, at 103s; 4 pockets Selme, Beckley, at 95s. The bulk to answer the samples. Samples and invoice to be sent per Rockingham coach. Payment in bankers’ at two months.” This was signed by the traveller on behalf of the plaintiffs:—*Held*, that it was a sufficient memorandum in writing of the contract, within the Statute of Frauds.

The defendant, on the same day, wrote to the plaintiffs, requesting them to deliver “the 27 pockets Playstead and the 4 pockets Selmes, 1836, Sussex,” to a third party. *Quære*, whether this letter sufficiently referred to the contract in question, so as that it might have been connected with the entry in the book, for the purpose of constituting a memorandum of the contract within the statute.

The bulk samples and invoice were sent to the defendant by the coach, pursuant to the contract, but he returned them, as not answering to the samples by which he bought. The jury, in an action for the price of the hops, found that the samples *did* answer the contract:—*Held*, that there was no acceptance of the goods within the Statute of Frauds.

Semble, the defence that there has

not been a sufficient memorandum in writing of a contract to satisfy the Statute of Frauds, may be taken under the general issue, without being specially pleaded. *Johnson v. Dodgson*, 653

GAME ACT.

By the provisions of the Game Act, 1 & 2 Will. 4, c. 32, s. 37, every penalty for any offence against that act is to be paid to some one of the overseers of the poor, or to some other officer (as the convicting justice or justices may direct) of the parish, &c. in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general county rate; but by the 5 & 6 Will. 4, c. 20, s. 21, reciting the former act, it is enacted, that one moiety of all such penalties shall go and be paid to the person who shall inform and prosecute for the same, and the other moiety thereof only shall go and be paid to such overseer or officer, and be by him applied in the manner before directed:—*Held*, that a conviction for an offence against the former act, which directed the whole penalty "to be paid to W. J., one of the overseers of the poor of the parish &c., to be by him applied according to the direction of the statute in such case made and provided," was bad, and that the justices who signed it were liable to an action for false imprisonment at the suit of the party convicted, and committed to gaol for non-payment of the penalty. *Griffith v. Harries*, 335

GOODS SOLD & DELIVERED.

1. By a written agreement, A. agreed with B. that B. should have his (A.'s) farm for his life for 20*l.* a year rent, and the whole of A.'s keep and maintenance; B. to take off the stock at 75*l.* 10*s.* B. having taken the stock,

HORSE-RACE.

and had possession of the land for his life:—*Held*, that his executor might be sued for the 75*l.* 10*s.* in an indebitatus count for goods sold and delivered.

Held, also, that inasmuch as the instrument could operate only as an agreement to grant B. a future lease of the farm for his life, it was properly stamped with a 1*l.* stamp. *Stone v. Rogers*, 443

2. Assumpsit for the value of goods, which the defendant agreed to purchase at the valuation of N. and M. Averments, that N. was ready to value for the plaintiff, but that the defendant and M. refused to value for the defendant; that the plaintiff gave notice to defendant that his valuer, N., was ready to meet M., or any other valuer the defendant might appoint, at any time within ten days which the defendant might fix for making the valuation; that the defendant refused to appoint any day for that purpose, and refused to appoint any other valuer, or to take any steps to value the goods or procure them to be valued, according to his agreement, and has ever since refused to value them, or to let them be valued, according to his agreement: whereupon, after the lapse of a month, N. valued them, and the price amounted to &c.; alleging a breach in not taking the goods and paying such amount:—*Held*, on demurrer, that the count was bad; for that the defendant could not be liable for the price of the goods until they had been valued by both valuers, pursuant to the agreement; at least without a distinct averment that the defendant refused to permit M. to value. *Turnell v. Balbirnie*, 786

HORSE-RACE.

Semle, that a party subscribing to a legal horse-race cannot recover his

stake from the stakeholder after the race has been run, and before the stakeholder has paid over the money.

At all events, he cannot recover it unless he demanded it before the race was run.

Where the rules of certain races provided that all disputes should be settled by the stewards, and two stewards had been named, one of whom, on a dispute arising as to which horse was entitled to the stakes of a race, gave his opinion in writing that the plaintiff was entitled to them:—*Held*, that the plaintiff could not recover the stakes on the award of that steward alone, although it appeared that the other steward had stated that he would acquiesce in whatever his colleague did. To make the sole award of the latter available, it must be clearly shewn that both the disputing parties, and the stakeholder also, submitted to his sole authority. *Marryat v. Broderick*, 369

HUSBAND AND WIFE.

(1). *Wife's Liability on her Contracts.*

1. To a declaration in assumpsit for goods sold and delivered, the defendant pleaded her coverture. The plaintiff replied, that the husband was an alien, and never was within this kingdom; that the causes of action accrued to the plaintiff, and the promise was made by the defendant, within the realm of England, while she lived separate and apart from her husband as a single woman; and that the plaintiff did not give any credit to the husband, but contracted with the defendant as a feme sole, on her own credit and responsibility; and that she made the promise in the declaration mentioned as such feme sole. Rejoinder, that the husband was not an alien, nor did the causes of action accrue to the plaintiff, nor was the

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promise made by the defendant, while she lived separate and apart from her husband as a single woman; nor did the plaintiff contract with the defendant as a feme sole, and on her own credit and responsibility; nor did she make the promise in the declaration mentioned, in manner and form, &c.; on which issue was joined:—*Held*, that on this issue the plaintiff was bound to prove that the defendant represented herself to the plaintiff as a feme sole, or that he dealt with her believing her to be such.

Held, also, that evidence of the defendant's dealings with other tradesmen, to whom it was alleged she had held herself out as a single woman, was not admissible, unless her representations to them were so made as to come to the plaintiff's knowledge. *Barden v. Keverberg*, 61

2. An action was commenced against a defendant whilst she was a feme sole; but, after service of the writ, and before declaration, she married. The plaintiff proceeded to final judgment, and took her in execution. On motion to discharge her out of custody, the affidavit stated the above facts, and also that no settlement was made upon the marriage; but it did not state that she had no separate property:—*Held*, that the affidavit was insufficient, and that she was not entitled to be discharged. *Evans v. Chester*, 847

(2). *Liability of Husband for Necessaries to Wife.*

A husband who had separated from his wife, agreed that a deed of separation should be prepared and executed:—*Held*, that the husband was not liable for the expenses of his wife's trustee in procuring a counterpart to be prepared and executed, in the absence of any promise by him to pay that expense. *Ladd v. Lynn*, 265

P P P

M. W.

ILLEGAL CONTRACT.

See BASTARD.RESTRAINT OF TRADE.
STOCK-JOBGING ACT.

INCLOSURE ACT.

1. A local inclosure act empowered the commissioner, by deeds executed in the presence of and attested by two witnesses, to sell such portions of the waste lands as should be necessary to defray the expenses of carrying the act into execution, before award made. In ejectment by a party claiming under a conveyance from the commissioner in pursuance of such power, it appeared that the lessor of the plaintiff purchased the land with the view of exchanging it with the defendant; that he never took possession of it, and that the defendant, some years after the conveyance, fenced it in, and had occupied it by his tenants ever since, a period of less than 20 years. It did not appear that any award had been made under the Inclosure Act:—*Held*, that the plaintiff was not bound, in order to recover in the ejectment, to prove that the commissioner had duly qualified, and given the notices, &c. required by the General Inclosure Act, before the execution of the conveyance. *Doe d. Nanney v. Gore*, 320

2. In 1812, S. P. conveyed two closes of land, in the parish of A., by way of mortgage, to W. P. In 1813, an inclosure act was passed for inclosing the waste lands in that parish; by which act the commissioners were empowered to set out, allot, and award any lands within the parish of A., in lieu of and in exchange for any other lands within that parish; provided that all such exchanges were ascertained, specified, and declared in the award of the commissioners, and

were made with the consent of the owner or owners, proprietor or proprietors of the lands which should be so exchanged, whether such owner or owners, proprietor or proprietors, should be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee simple, fee tail, or for life or lives, or for term of years absolute, or for term of years determinable upon life or lives; such consent to be testified in writing under his or their hands, &c. By the consent of S. P., the mortgagor, the above two closes of land were exchanged, under the act, for two other closes, and the commissioners stated in their award that the exchange was made with the consent of S. P. the mortgagor, in writing under his hand, but it was not stated to have been made with the consent of the mortgagee:—*Held*, that it was not necessary to say whether the consent of the mortgagee was necessary to give validity to the exchange, and that the court had no right to presume that it was not given; for that the commissioners were not bound to state in their award all the authorities they had; and that the presumption was, that they had acted according to their jurisdiction, as the contrary did not appear.

In ejectment by a mortgagee against the assignee (under the Lords' Act) of the mortgagor:—*Held*, that a letter from the mortgagor to the mortgagee, dated previously to the assignment, was evidence against the defendant, and would be presumed to have been written at the time of its date, until the contrary was shewn. *Goodtitle v. Milburn*, 853

INFORMATION OF IN-
TRUSION.

In an information of intrusion, the Crown may of right lay the venue in any county, or have the inquisition

taken in a different county from that in which the venue is laid.

The title of the Crown to lands of which it has been out of possession for 20 years, may be tried in the information of intrusion itself, and need not be first found by inquest of office; the only effect of the stat. 21 Jac. 1, c. 14, being, to throw the onus of proving title in the first instance, in such case, on the Crown. *Seemle*, that, in an information at the suit of the Attorney-General, a tales may be prayed for the Crown without his warrant, though he be not present; but not for the defendant. *Attorney-General v. Parsons*, 28

INSOLVENT.

(1). *Transfer by.*

1. The 32nd section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, does not apply only to such assignments and transfers as are made within three months before the commencement of the imprisonment, or during the continuance of such imprisonment, but extends to assignments made at any time, even a year previous to the imprisonment, if made with the view or intention of petitioning the court for the insolvent's discharge. *Becke v. Smith*, 191

2. The defendant, the proprietor of a stage-coach, delivered to A., who horsed the coach one stage, five horses, to be used upon the coach. Three of them died, and A. bought three others in their place. After using these five for some months, A. became insolvent, and went to prison, and was subsequently discharged under the Insolvent Act. On the day he went to prison, he sent an order, under which the five horses were delivered to the defendant, who refused to give them up to the assignee. The five were worth 100*l.*, and any two of them were

worth 30*l.* In trover by the assignee for the three horses which A. had bought, the defendant set up, in one plea, an agreement under which he claimed to retain the five horses delivered by him to A. as a security for their price, alleging that 22*l.* of the price was still unpaid:—*Held*, that as to the three horses bought by A., there was no evidence to shew that he transferred the property in them to the defendant.

Held, also, that even if the property was transferred, there was sufficient *prima facie* evidence that the transfer was voluntary, within the 7 Geo. 4, c. 57, s. 32. *Bolton v. Sherman*, 395

(2). *From what Debts discharged.*

An insolvent debtor, who inserts in his schedule the name of the holder of a bill of exchange on which he is liable, or gives such other description of it as satisfies the statute (7 Geo. 4, c. 57, s. 46), is discharged as to all the parties to the bill (although they are not named in the schedule), and also as to the original debt for which it was a security. *Boydell v. Champneys*, 433

INSURANCE.

A policy of insurance on a ship called the *King George*, at and from Malaga to London, warranted to sail on the 10th October, was effected on the 3rd November following. The insurer communicated to the underwriters that the *King George*, and another vessel called the *Fruiter*, both sailed from Malaga on the 10th October, and the underwriters knew that the *Fruiter* had arrived at London some days before; but the insurer knew also that the captain of the *Fruiter* had seen the *King George* off Oporto on the 21st of October, when they had parted company by reason of

a gale coming on; and this fact he did not communicate to the underwriters. The King George was lost in a storm at the entrance of the Channel, on the 25th October. In an action on the policy, the jury having found for the plaintiff, and that the fact not communicated was not a material one, the court granted a new trial. *Westbury v. Aberd.* in, 267

INTERPLEADER ACT.

1. When, upon a rule obtained under the Interpleader Act, the execution creditor did not appear, and it was doubtful whether the sheriff, who had acted under his express direction, had not misconducted himself subsequent to the seizure, the court made an order that the execution creditor should be barred against the claimant, and the goods restored to the latter; the claimant to be at liberty to bring an issue against the sheriff for misconduct, provided it should turn out he had been guilty of any; and also, if there had been any misconduct in the execution creditor in giving directions to the sheriff, to bring an action against him. *Lewis v. Jones*, 203

2. The sheriff must apply to the court under the Interpleader Act, in the term next after the claim is made, and soon enough to enable the other parties to shew cause in that term. If he does not, either the rule will be discharged, or he must pay the costs of both the other parties. *Beal v. Overton*, 534

3. Where an uncertificated bankrupt brought an action for work done by him, and on a reference a certain sum was found to be due to him, which his assignees thereupon claimed from the defendant:—*Held*, that, on a fresh action being brought by the bankrupt for the amount, the

defendant might call upon the assignees, by an interpleader rule, to support their claim, and that upon such rule the lien of the bankrupt's attorney for their costs in the former action and the reference ought to be satisfied out of the amount claimed. *Jones v. Turnbull*, 601

4. The defendant having purchased cattle from the plaintiff, accepted a bill in payment, with a blank for the name of the drawer, and remitted it by post to the plaintiff. This bill subsequently came into the hands of B. and S. for a valuable consideration. The plaintiff, denying that he had ever authorized payment by an acceptance, or that he had ever received the bill or indorsed it, brought an action against the defendant for the price of the cattle. B. and S. also threatened to commence an action against him upon the bill:—*Held*, that the defendant was not entitled to relief under the first section of the Interpleader Act. *Farr v. Ward*, 844

LANDLORD AND TENANT.

See AGREEMENT.

1. A., B., and C., C. being an unmarried woman, entered into an agreement, dated 25th December, 1834, to take a house of the plaintiff for seven years, at a certain annnal rent, payable quarterly; under which they entered. In September 1835, C. married, in December A. became bankrupt. In an action of debt by the plaintiff against A., B., C., and C.'s husband, for two years' rent, claimed to be due under the demise contained in the above agreement, the defendants by their plea denied the demise. There was also a count for use and occupation, to which they pleaded payment of all the rent due before C.'s marriage. The defendants proved payment by A.'s assignees of the quarter's rent due at Michaelmas

1835, and an admission by the plaintiff of the receipt of the two previous quarters' rent; but it was not shewn when or by whom these latter payments were made: *Held*, that this was not evidence from which a new yearly tenancy, on the terms of the agreement, could be inferred, so as to charge all the defendants, inasmuch as it was not shewn that the payments were made before C.'s marriage, or with her assent after her marriage. *Doidge v. Bowers*, 365

2. A breach, in an action by landlord against tenant, that the tenant threatened to commit waste, unless he were paid a certain sum by the incoming tenant, and that the latter was thereby compelled to and did pay him that sum, in order to prevent his committing such waste, is bad. Where general damages are given on a declaration, in which several breaches are assigned, one of which is bad, the court will not arrest the judgment, but will award a *venire de novo*. *Leach v. Thomas*, 427

LAND-TAX.

The King's dock yards are not assessable to the land-tax. *Attorney-General v. Hill*, 160

LEASE.

(1). *Concurrent Leases.*

Where A., being seised in fee, leased premises to B. for 61 years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the 61 years:—*Held*, that, by the lease to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease. *Smith v. Day*, 684

(2). *Under Power.*

A testator, by his will, empowered

his devisee for life of real estate to demise and lease for 21 years, "so as upon such lease there were reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income for or in respect of such lease or leases, and that in every such lease there should be contained a clause of re-entry for non-payment of the rent." In exercise of this power, a lease was made for 21 years, to hold from the 11th October, 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, viz. on the 6th of April and the 11th of October in every year, by equal portions, *except the last half year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the term.*" The lease also contained a proviso for re-entry, if the rent should be unpaid for forty-two days after it became due:—*Held*, that the lease was a good execution of the power. *Doe d. Wythe Rutland, v.* 661

(3). *Surrender of.*

A., having granted a lease to B. for 21 years, before the expiration of that term granted another lease of the same premises to C. No surrender in writing of B.'s interest was shewn, but the lease granted to him was produced from A.'s custody, with the seal torn off; and it was proved to be the custom to send in the old leases to A.'s office, before a renewal was made; and which old leases were thereupon cancelled by A.'s officer:—*Held*, that this was evidence from which the jury might presume that B. had assented to the grant of the lease to C., so as to determine his interest by act and operation of law. *Walker v. Richardson*, 882

LEGACY DUTY.

One S. M. by his will devised all his real estates, except his mortgages in fee, unto W. V. and J. M., their heirs and assigns, to and upon the uses and trusts therein mentioned, viz. to the use of W. M. and his assigns for life, with remainder in tail to his issue, with divers remainders over. And the said S. M., the testator, by his will gave and devised all the residue of his personal estate (after payment of debts and legacies), and also all such real estates as he was seised of as mortgagee in fee, unto W. V. and W. M., their heirs, executors, administrators, and assigns, upon trust, to convert the whole of the said residue into money, and to lay out and invest the same, as soon as conveniently might be, in the purchase of real estate, to be conveyed to the said W. V. and J. M. (the trustees of his real estates), their heirs and assigns, to and upon the same uses and trusts as were thereinbefore declared of and concerning his real estates. And the testator thereby declared, that until such purchase were made, his said executors should place out or continue all the said residue at interest, in the names of his said executors, on mortgage of real estate; or, if the same should not offer, that the residue should be placed out at interest in the public funds; and the interest and dividends were directed to be paid to the persons to whom the rents and profits of the real estate therewith to be purchased would belong by virtue of his will. The testator appointed the said W. V. and W. M. his executors, and died in 1791, when they took upon themselves the execution of the will. The residue amounted to 14,000*l.* and was invested in mortgage, in the names of the executors, before the year 1796, and before the act of 36 Geo. 3, c. 52; after which W. V. died, and W. M., who enjoyed the

interest during his life, became the surviving executor. W. M. died without issue in 1825, and appointed W. H. and G. R. his executors. The money was never applied in the purchase of real estate; and W. H. and G. R., the executors under the will of W. M., on the 26th January, 1832, paid the residue of the personal estate of S. M. (the original testator) to J. M., he being the person entitled to it under S. M.'s will:—*Held*, that this was a legacy given by the will of a person dying before the 5th of April, 1805, and paid, satisfied, or discharged after the 31st day of August, 1815, within the meaning of the 55 Geo. 3, c. 184, and was liable to the payment of legacy duty under that act. *Attorney-General v. Hancock*, 563

LIMITATIONS (STATUTE OF).

See ADVERSE POSSESSION.

On a note payable with interest on demand, the Statute of Limitations begins to run from the date of the note. *Norton v. Ellam*, 461

LIVERY OF SEISIN.

Semble, that possession for a less period than 20 years is not sufficient to leave to the jury for them to presume that livery of seisin has been made. *Doe d. Lewis v. Davies*, 503

LUNATIC.

See ACCOUNT STATED.

MIDDLESEX COURT OF REQUESTS.

1. A plaintiff is liable to costs under the Middlesex Court of Requests Act, 23 Geo. 2, c. 33, s. 17, where he recovers less than 40*s.*, though his claim was reduced below that sum by the Statute, of Limitations being pleaded.

But where the declaration was in debt for work and labour, and it appeared that the work and labour con-

MORTGAGOR & MORTGAGEE. PARTICULARS OF DEMAND. 939

sisted of the levying of an execution by the plaintiff, as a broker, on the goods of a party resident in Surrey:—*Held*, that this was not cognizable by the Court of Requests, though the defendant resided in Middlesex. *Bailey v. Chitty*, 28

2. It is not necessary, in order to entitle a defendant to enter a suggestion for costs under the Middlesex Court of Requests Act, 23 Geo. 2, c. 33, s. 19, that the *plaintiff* should have been resident within the jurisdiction.

The sheriff or other officer, who tries a cause under a writ of trial, has no power to certify, under the 23 Geo. 2, c. 33, s. 19, that the freehold or an act of bankruptcy was in question. If that be the case, it should be shewn for cause when the application is made to try before the sheriff, when it may be imposed as a term that he should have power to certify. *Pritchard v. M'Gill*, 380

MORTGAGOR & MORTGAGEE.

See INCLOSURE ACT, 2.

MORTMAIN ACT.

Where lands are already in mortmain, being vested in an ecclesiastical corporation, a lease of such lands to charitable uses is not within the statute 9 Geo. 2, c. 36. *Walker v. Richardson*, 882

MUNICIPAL CORPORATION ACT.

1. Under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 54, the offence of *corrupting* a voter is complete where the bribe is offered and accepted, and the voter promises to vote in pursuance of the corrupt contract, although he may break his promise, or may never have intended to perform it; but where a bribe is offered, but not accepted, the offence

is that of *offering to corrupt*: and it is for the jury to say whether there was a complete agreement or not. *Harding v. Stokes*, 233

2. Under the Municipal Corporation Act, 6 Will. 4, c. 76, s. 92, the council of a borough have no power to make a retrospective rate. *Woods v. Reed*, 777

OUTLAWRY.

See PRACTICE, II. (2).

An outlaw cannot appear in court for any other purpose than to reverse his outlawry. Therefore, he cannot sue out a habeas corpus ad satisfaciendum, in order to charge a plaintiff in execution, against whom he has obtained judgment as in case of nonsuit; although his outlawry was at the suit of a different plaintiff.

The Court refused, however, after the lapse of three terms, to set aside the judgment on the same ground. *Aldridge v. Buller*, 412

OVERSEER.

A parish officer who supplies goods for his own profit to an individual pauper, is not liable to the penalty imposed by the 55 Geo. 3, c. 137, s. 6.

Quære, whether that clause is impliedly repealed by the 4 & 5 Will. 4, c. 76, s. 77. *Henderson v. Sherborne*, 236

PARTICULARS OF DEMAND.

See FOREIGN JUDGMENT.
PLEADING. III. 6.

(1). *Effect of, in Evidence.*

Assumpsit for wages. Plea, non-assumpsit. The particulars of demand stated a claim for wages at 15s. per week, amounting altogether to 148l., and gave credit for payments on account to the amount of 70l. At the trial, the defendant put the

particulars in evidence, as shewing a payment of 70*l.*; and the jury having found that the plaintiff was only entitled to wages at the rate of 7*s.* per week (which destroyed the balance of 78*l.* claimed by the plaintiff), gave a verdict for the defendant:—*Held*, that the particulars were properly received in evidence as an admission of the payment; and, it not having been objected at the trial that they could only be used in reduction of damages, and not in bar of the action, that the verdict ought not to be disturbed.

Quære, whether payments admitted in the particulars need be pleaded.
Kenyon v. Wakes, 764

(2). *Form of.*

In assumpsit by the indorsee against the acceptor of two bills of exchange for 250*l.* each, the writ of *capias* was indorsed "Bail for 240*l.* and upwards." A declaration was afterwards delivered, containing two counts, one upon each of the bills. The particulars of demand which accompanied the declaration was as follows: This action is brought to recover the sum of 260*l.* and upwards, due from the defendant to the plaintiff, upon the several bills of exchange set forth in the first and last counts of the declaration," &c. An order having been made for further and better particulars:—*Held*, on motion to set aside this order, that the defendant was entitled to better particulars: *Alderson, B.*, dissentiente. *Daves v. Anstruther*, 817

PARTNERSHIP.

Liability of retired Partner.

H., an officer serving in the King's forces in India, in 1815, deposited money with A., B., C., & D., bankers in Calcutta, trading under the firm of A. & Co. In 1818 A. came to England, having executed a deed

whereby he was to cease to be a partner in the firm in 1822, and E. was to be admitted a partner in his room. In 1822, A. accordingly retired from, and E. came into the partnership, and the dissolution was announced in the *Calcutta Gazette*. It appeared to be the practice of the firm to give notice of changes of partnership to their customers by circular letters: there was, however, no proof that any letter reached H. announcing A.'s retirement. In 1822, A. became a candidate for a seat in the direction of the East India Company, and repeatedly published an address to the proprietors of East India Stock in several newspapers, stating that his connexion with mercantile concerns in India had ceased. Two of these newspapers were taken in at the reading-room of a town where H., who had returned to England, was then resident. The accounts-current of A. & Co., were transmitted yearly to H. from 1817 to 1832, and the rates of interest allowed on them varied several times after the year 1822. In 1831, H. executed a power of attorney to the then members of the firm of A. & Co., to collect the effects of a testator in India. In 1832, A. & Co. failed. In 1833 H. executed another power of attorney to C. (who also had then retired from the firm) to prove debts against the estate of the bankrupts, (naming them, and describing them as carrying on business under the firm of A. & Co.), and to receive dividends:—*Held*, that these facts constituted sufficient evidence to go to the jury to shew that H. knew that A. had retired from the firm, and E. had come in in his place; and that he had agreed to discharge A. from liability, and take the new firm as his debtors.
Hart v. H. Alexander, 484

PATENT.

PATENT.

1. Where a patent is originally void, but amended under 5 & 6 Will. 4, c. 83, by filing a disclaimer of part of the invention, that act has not a retrospective operation, so as to make a party liable for an infringement of the patent prior to the time of entering such disclaimer. *Perry v. Skinner*, 471

2. If a patent be taken out for several inventions, which are claimed as *improvements*, and the jury find that one of them is not an improvement, the patent is altogether void.

Where it appeared that, a few months before the date of a patent for an improvement in paddle wheels, two pairs of the wheels were made for the plaintiff (to whom the patent was afterwards assigned) by an engineer and his workmen at his own manufactory, under the directions of the patentee, and under an injunction of secrecy, the engineer being paid for them by the plaintiff; that, when finished, they were taken to pieces, packed up, and shipped for a foreign port; where, according to the plaintiff's directions, they were put together, and used (after the date of the patent) in steam-boats belonging to a company of which the plaintiff was the manager and a principal shareholder: *Held*, that this was not such a publication of the invention as to avoid the patent. *Morgan v. Seaward*, 544

PETITION OF RIGHT.

A petition of right was addressed to the King "in his Court of Exchequer, and concluded with a prayer that he would be pleased to order that right be done, and to indorse his royal declaration thereon to that effect; and that he would refer the petition, with such order and declaration thereon, "to the Barons of

PLEADING.

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his Majesty's Exchequer." The King indorsed the petition, "Let right be done :"—*Held*, that this Court had no jurisdiction to adjudicate upon the matter. *In re Pering*, 873

PLEADING.

See BILLS AND NOTE, III.

FOREIGN JUDGMENT.

GOODS SOLD AND DELIVERED.

PARTICULARS OF DEMAND, 1.

PRACTICE, 3.

TRESPASS, 1.

TROVER, 1.

I. Declaration.

(1). Commencement.

The declaration stated in the commencement of it, that the plaintiff was a debtor to the King, &c., and concluded with the *quo minus* clause, as in the old form:—*Held*, on special demurrer, that the declaration was sufficient, as this was surplusage only, and that the proper course was for the defendant to have obtained a summons to strike out the superfluous matter. *Alderson v. Johnson*, 70

(2). Blending Fact and Law.

Semble, that a declaration against a sheriff for extortion in the execution of a *fi. fa.* must state the sum actually taken by him; and that it is not sufficient to allege that he took £— more than by the statute is allowed. *Ashby v. Harris*, 673

(3). Several Counts.

A rule to strike out any of the counts of a declaration must be drawn up on reading the declaration, or on an affidavit stating the nature and effect of the different counts. *Roy v. Bristowe*, 241

(4). Joinder of Counts.

A count for work done by the plaintiff as administrator may be

joined with counts for goods sold and work done by the intestate, on promises to him. *Edwards v. Grace*.

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(5). *Allegation of Promise in Assumpsit.*

1. The want of an allegation of a promise to pay, in an indebitatus count, is not supplied, even after verdict, by a plea of non-assumpsit pleaded to the whole declaration; nor by the statement at the commencement of the declaration, that the defendant was summoned to answer in an action on promises, or the conclusion, that "in consideration of the premises respectively before mentioned, the defendant promised to pay, &c.," such promise being confined in its terms to other counts. *Hayter v. Moat*,

56

2. *Semble*, that, in a count on a bill or note, no promise to pay need now be alleged.

At all events, the omission cannot be taken advantage of except on special demurrer. *Griffith v. Roxbrough*,

734

3. The declaration stated that one S. T., on &c., made his promissory note in writing, and thereby promised to pay to the order of the defendant at Messrs B., T., and B.'s, London, 99*l.* 18*s.*, two months after date, for value received, which period had, at the time of the commencement of the suit, elapsed, and then delivered the said note to the defendant; and the defendant then indorsed said note to the plaintiff, and promised to pay the same according to the tenor and effect thereof; but the said Messrs. B., T., & B., did not, nor did the said S.T., nor the defendant, nor any other person, pay the said note, although the said note was presented at Messrs. B., T., & B.'s on the day when it became due, of which the defendant then had notice:—*Held*, on motion in arrest of judgment, that the promise was properly stated, and that the

breach was sufficient. *Hedger v. Steavenson*,

799

(6). *In Assumpsit—Consideration.*

Semble, that a declaration in assumpsit stating that the plaintiff being about to proceed to N., paid money to the defendants in London, that they might cause it to be paid to him at N. on a certain day; that the defendants received the money for that purpose from the plaintiff; and that thereupon afterwards, in consideration of the premises, the defendants promised to cause the money to be paid to the plaintiff at N., discloses a sufficient consideration for the promise. *Shillibeer v. Glyn*,

143

(7). *On Bill of Exchange.*

Action on a bill of exchange by the drawer against the acceptor. The declaration alleged that the bill was made on the 29th of March, payable four months after date, "which period has now elapsed:"—*Held*, that the declaration was sufficient, and that it was not necessary to aver that four months had elapsed "before the commencement of the suit." *Owen v. Waters*,

91

II. *Pleas in Abatement.*

Time for Delivery of.

Since Rule viii. of Hilary Term, 2 Will. 4, the four days within which pleas in abatement must be delivered are to be computed exclusively of the first and inclusively of the last day. *Ryland v. Wormald*,

393

III. *Pleas in Bar.*

(1). *General Issue, where admissible.*

If an executor declares on a bill or note payable to his testator, laying a promise to pay him (the executor), such promise may be denied by a plea of non-assumpsit, notwithstanding the new rules. *Timmis v. Platt*,

720

(2). *Evidence under General Issue.*

1. *Seemle*, the defence that there has not been a sufficient memorandum in writing of a contract to satisfy the Statute of Frauds, may be taken under the general issue, without being specially pleaded. *Johnson v. Dodgson*, 653

2. The plea of not guilty, to a declaration in case against a sheriff for a false return of nulla bona to a writ of fieri facias, puts in issue only the fact of the sheriff having the money in his hands, and making the return alleged; and it is not competent to him, under that plea, to set up as a defence the bankruptcy of the debtor before the execution of the writ. *Wright v. Lainson*, 739

3. In an action of debt, where there is no plea of payment, the defendant cannot give evidence of payment in reduction of damages. *Belbin v. Butt*, 422

(3). *When bad as amounting to General Issue.*

1. A special plea to an action on an attorney's bill, which sets up as a defence that the plaintiff conducted the business so negligently and unskilfully as to be useless to the defendant,—or, that it was done under an indemnity from the plaintiff against costs and expenses,—is bad on special demurrer, as amounting to the general issue. *Hill v. Allen*, 283

2. Case for driving a coach of the defendant against the plaintiff's carriage, in which were two of his sons, and injuring it and them. Plea, stating that the plaintiff's carriage was under the guidance and direction of one of his sons, who was driving it, and that the defendant, by his servant, was carefully and properly driving his coach; that if the plaintiff's son had driven his carriage carefully

and properly, no collision would have taken place, nor any injury have been occasioned to the plaintiff's carriage or to his sons; but that the plaintiff's son drove the carriage so negligently and improperly, that it ran and struck against the defendant's coach; and by means thereof, and without any carelessness or improper conduct of the defendant by his servant, the defendant's coach ran and struck against the plaintiff's carriage, whereby the supposed damages in the declaration mentioned were occasioned: so that if any damage was occasioned to the plaintiff's carriage or to his sons, it was occasioned by the carelessness, negligence, and improper conduct of the plaintiff's son so driving his carriage: without this, that the defendant, by his servant, so carelessly and improperly drove his coach, that by and through his carelessness and improper conduct in that behalf, the defendant's coach struck against the plaintiff's carriage, in manner and form, &c.; concluding to the country:—*Held* bad on special demurrer. *Gough v. Bryan*, 770

3. Assumpsit against the defendant as a common carrier, to recover the value of goods delivered to him, to be taken care of and safely carried by him, as such carrier, in his cart, from N. to B., and there safely delivered by him for the plaintiff, but which were lost by his negligence. Plea, that when the defendant received the goods, an express condition and agreement was made between him and the plaintiff, that the plaintiff should accompany the cart, and watch and protect the goods from being lost or stolen; but that he neglected and refused so to do; by reason whereof, and not by reason of any negligence of the defendant, the goods were lost:—*Held* bad on special demurrer, as amounting to the general issue. *Briad v. Dale*, 775

(4). *When bad as not answering whole Declaration.*

A declaration contained one count on a bill of exchange against the acceptor, and a second count on an account stated. The defendant pleaded that he did not accept the bill of exchange in the declaration mentioned, taking no notice of the count on the account stated:—*Held*, that the plea was bad on special demurrer. *Putney v. Swann*, 72

(5). *Giving colour.*

Trover for an oak tree, the property of the plaintiff. Plea, that the defendant was seised in fee of a close, and, being so seised, he, the defendant, cut down the tree, which he afterwards delivered to one Richard Roe, to be kept for the use of him the defendant; and that the said R. R. afterwards delivered it to the plaintiff, whereupon the defendant took it out of the possession of the plaintiff, as he lawfully might do for the cause aforesaid, which was the same conversion in the declaration mentioned:—*Held*, on special demurrer, that the plea was good. *Morant v. Sign*, 95

(6). *Payment.*

Assumpsit for use and occupation, the sum stated in the declaration being 105*l*. The plaintiff delivered particulars as follows:—“The plaintiff seeks to recover in this action the sum of 52*l*. 10*s*., being the balance of one year's rent due from the defendant for the occupation of a farm, &c., which he quitted on the 2nd February, 1833.” The defendant afterwards pleaded, as to all but 52*l*. 10*s*., non-assumpsit; as to 52*l*. 10*s*., residue, payment. The plaintiff joined issue on the plea of non-assumpsit, and entered a nolle prosequi as to the plea of payment. At the trial, the plaintiff having proved an occupation

for several years, at a rent of 105*l*. a-year, the defendant proved payment of all the rent:—*Held*, that the plaintiff was nevertheless entitled to a verdict for nominal damages. *Nicholl v. Williams*, 758

(7). *Tender.*

A plea, by the acceptor of a bill of exchange, that, *after the bill became due*, and before the commencement of the suit, he tendered to the plaintiff the amount of the bill, with interest from the day it became due, and that he hath always, *from the time when the bill became due*, been ready to pay the plaintiff the amount, with interest aforesaid:—*Held* bad on special demurrer. *Poole v. Tumbridge*, 223

(8). *Several Pleas.*

1. In an action on a bill of exchange by indorsee against acceptor, the defendant, having obtained an inspection of the bill, pleaded pleas denying the acceptance, the drawing, and the indorsement, and also a plea founded on the 3 & 4 Will. 4, c. 97, s. 17, that the bill was written on paper improperly stamped with an old die. The court struck out the last plea. *Dawson v. Macdonald*, 26

2. In an action on a banker's cheque, the court refused leave to add a plea, (the time for pleading having expired), that it was drawn by the defendant more than 15 miles from the place where it was made payable, and falsely dated, in contravention of the 9 Geo. 4, c. 49, s. 15. *M'Dowall v. Lyster*, 52

(9). *To Action on Bill of Exchange.*

To an action against the defendant as indorser of a bill of exchange, he pleaded that “he did not make or draw the bill of exchange as in the declaration alleged:”—*Held*, that the plaintiff was not entitled to treat this plea

as a nullity, and sign judgment as for want of a plea. *Allen v. Walker*, 317

(10). *In Trover.*

In trover, since the new rules, the plaintiff is entitled to a verdict on the plea of not guilty, if on the trial a conversion in fact be proved, although it appeared from the evidence, that, at the time of such conversion, the plaintiff had parted with his property in the goods.

Where a party, to whose order goods were lying at a wharf, gave the wharfinger an order to deliver them to A., but afterwards, with A.'s concurrence, gave him a fresh order to deliver them to B., which he did:—*Held*, in an action of trover by A., against the wharfinger, that the defendant might avail himself of such transfer to B., under a plea that the plaintiff was not possessed of the goods as in the declaration mentioned. *Vernon v. Shipton*, 9

(11). *Signature.*

A plea of plene administravit does not require to be signed by counsel. *Reed v. Spurr*, 76

IV. *Replication.*

(1). *De injuria.*

Trespass for assaulting the plaintiff, and with the defendant's hands and with a truncheon beating, bruising, wounding, and ill-treating her, and striking her down with the truncheon, whereby her thigh was broken. Pleas—first, not guilty; secondly, as to *assaulting, beating, and ill-treating* the plaintiff, that the defendant was possessed of a house, and the plaintiff was making a great noise and disturbance therein, whereupon the defendant requested her to cease from making such noise and disturbance, and to leave the house, which she refused;

whereupon the defendant, in defence of the possession of his house, gently laid his hands upon her in order to remove her, and did remove her, out of the house. Replication, *de injuriâ*:—*Held*, first, that the special plea was no justification of the striking and wounding with the truncheon; secondly, that the fact of the noise and disturbance being proved, the *motive and intention* with which the defendant turned the plaintiff out of the house could not be inquired into on the general traverse *de injuriâ*. *Oakes v. Wood*, 791

V. *New Assignment.*

Trespass for breaking and entering the plaintiff's dwelling-house, and taking away certain goods. Plea, that one W. F., before the said time when &c., held a certain dwelling-house as tenant to the defendant at the rent of 8*l.*; and that just before the said time when &c., the sum of 8*l.* of the rent aforesaid was due from the said W. F. to the defendant: and that afterwards, and within thirty days next before the said time when &c., the said W. F. fraudulently and clandestinely carried and conveyed away his goods, to prevent the defendant from distraining the same, to the dwelling-house of the plaintiff, without leaving any other goods sufficient to satisfy the said arrears of rent, whereon the defendant could distrain; that the defendant requested the plaintiff to allow him to search his house for the goods so clandestinely removed, which the plaintiff refused to do; and that thereupon he the defendant obtained a search-warrant from a justice &c., under and by virtue of which he entered the plaintiff's dwelling-house, for the purpose of searching for the said goods, which was the trespass of which the plaintiff complained. The plaintiff new as-

signed, that the action was brought, not for the trespass in the plea mentioned, but for breaking and entering the house on another and different occasion, and at another and different part of the same day. The defendant pleaded to the new assignment, that W. F. was his tenant at the rent of 8*l.*, and that 8*l.* rent for one year was in arrear; that W. F. had fraudulently removed his goods, to prevent a distress, to the plaintiff's house; therefore he entered to take them: to which the plaintiff replied, *de injuriâ*. At the trial, it was proved that W. F.'s goods had been fraudulently removed to the plaintiff's house, to avoid the distress; but no evidence was given of any demise at the rent stated, or of the rent in arrear:—*Held*, that these facts were not admitted by the new assignment, and ought to have been proved. *Norman v. Wescombe*, 349

VI. Demurrer.

If a special demurrer be delivered without a marginal note of the matter intended to be argued, the court will set it aside. But it is sufficient if it state that the points intended to be argued are those stated in the demurrer itself. *Lindus v. Pound*, 240

VII. Arrest of Judgment.

1. Where separate damages are assessed on each count of the declaration, if one count is bad, the judgment will be arrested on that count only. *Hayter v. Moat*, 56

2. Where general damages are given on a declaration, in which several breaches are assigned, one of which is bad, the court will not arrest the judgment, but will award a venire de novo. *Leach v. Thomas*, 427

VIII. Repleader.

Debt on an award. The declara-

tion alleged that differences had arisen between the plaintiff, as administratrix of M. T., and the defendant, concerning certain sums of money due from the defendant to the plaintiff, as administratrix, as to part of which there had been a settlement on a certain day in the lifetime of the said M. T., to wit, on &c., which settlement was the last settlement next before the making of the award: and that the arbitrator awarded that there was due from the defendant to the plaintiff 150*l.*, with interest from the period of the said last-mentioned settlement. The defendant pleaded, first, that the arbitrator did not make any award concerning the premises in the declaration mentioned, *modo et formâ*; 2dly, that the day in the declaration in that behalf mentioned was not the day of the last settlement next before the making of the award; 3dly, that no such settlement as in the declaration mentioned was at any time made. It appeared that the date of the last settlement was not in dispute between the parties.

Held, that the second issue was immaterial; and the jury having found it for the defendant, the Court awarded a repleader as to that issue.

Held, also, that the award was sufficiently certain.

Where a plea raises an immaterial issue, but contains no confession of the cause of action, the proper course is to award a repleader, not to give judgment non obstante veredicto.

Where there are several pleas on the record, on which issues are taken, but on none of them the cause of action is fully confessed, or proved, the Court may award a repleader, if one of the issues be immaterial.

On a judgment of repleader, neither party is entitled to costs. *Phemmer v. Lee*, 495

POOR.

See OVERSEER.

POWER.

See LEASE, 2.

PRACTICE.

I. Venue.

Where the venue has been retained in the county in which it was originally laid, on undertaking to give material evidence in that county, it is no ground of nonsuit that the plaintiff has not given material evidence in that county, unless the objection be taken at *Nisi Prius*. *How v. Pickard*, 373

II. Distringas.

1. A distringas, for the purpose of proceeding to outlawry, may issue after a writ of summons which has been continued by alias and pluries, sued out to save the Statute of Limitations. *Reay v. Youde*, 188

2. Where it appears on the face of the affidavit used to obtain a distringas to compel appearance, that the defendant is abroad, the entry of appearance for the defendant, and judgment signed thereon, are irregular; the plaintiff ought to have proceeded by process of outlawry. *Partridge v. Wallbank*, 893

III. Rule to plead.

When a rule to plead is given before notice of declaration, it is irregular; but the irregularity is waived by taking out a summons for time to plead. *Pope v. Mann*, 881

IV. Passing Record.

By the practice of the Courts of Queen's Bench and Exchequer, a plaintiff has not a right to enter and pass his record immediately after issue joined and notice of trial given, so as to make the defendant pay the costs of it; but it is in the discretion of the Master to allow such costs or not, as he thinks fit. *M'Kune v. Smith*, 85

V. Notice of Trial.

1. Where notice of trial has been given, which is afterwards countermanded, it is not necessary to reseal the record, unless the alteration is made to a day after the return of the writ. *Chandler v. Bennett*, 205

2. Where a rule for setting aside the issue and notice of trial, on the ground that the former was delivered as for trial at the sittings, and the latter before the Secondary, was drawn up on reading the Judge's order for trial before the Secondary, the Court took judicial notice that it was an order in the cause, though that was not stated in the affidavits. *Attwill v. Baker*, 272

3. Where a plaintiff avails himself of the terms of short notice of trial, he has no power of countermand; and therefore, if he does not proceed to trial, he must pay costs up to the time of the countermand. *Doncaster v. Cardwell*, 390

VI. Trial.

(1). Withdrawal of Juror, Effect of.

See ARBITRATION.

In an undefended action on a mortgage deed, the plaintiff's counsel inadvertently took a verdict for the principal money only, omitting to include the interest. The court refused to increase the verdict. *Baker v. Brown*, 199

VII. Judgment.

(1). When to be signed.

Judgment signed before an appearance entered is irregular, although the defendant has given a cognovit, in which he authorizes the plaintiff's attorney to appear for him if necessary, and the attorney, on the day after judgment signed, enters an appearance nunc pro tunc. *Watson v. Dore*, 386

(2). *For Want of Plea.*

1. A declaration was delivered on the 9th of January, indorsed to plead in four days, and on the same day the plaintiff demanded a plea. The plaintiff having signed judgment for want of a plea at one o'clock on the 14th:—*Held*, that the judgment was regular. *Blundell v. Hanson*, 243

2. The defendants, after obtaining a week's time to plead, took out several summonses, on successive days, for further time, the last being returnable on the day after the week's time expired; but took no order on either of them. On that same day the plaintiff signed judgment:—*Held* regular. *Bass v. Cooper*, 310

(3). *As in case of a Nonsuit.*

1. Where issue was joined in vacation, but no notice of trial given (it not being shewn that it was a country cause):—*Held*, that it was too early to apply for judgment as in case of a nonsuit in the next term but one after issue joined. *Heale v. Curtis*, 76

2. A plaintiff, after issue joined, became bankrupt, and made default, and his assignees refused to proceed with the suit: the Court refused to discharge a rule for judgment as in case of a nonsuit on a peremptory undertaking, unless security for costs were also given. *Taylor v. Montague*, 315

3. Where issue is joined in vacation in a town cause, the defendant cannot move for judgment as in case of a nonsuit, until the third term after issue joined. *Gough v. White*, 363

4. The plaintiff having made default, gave, on the 10th April, a fresh notice of trial before the sheriff on the 18th. On the 14th, the defendant gave notice of a motion for judgment as in case of a nonsuit, and on the 15th obtained a rule accordingly. On the 18th the cause was

tried as an undefended one, and the plaintiff had a verdict. The court set aside that verdict on payment of costs, and discharged the rule for judgment as in case of a nonsuit, with costs, on a peremptory undertaking, giving the defendant the costs of the day on the first default.

Quære, whether, since the rule of Hilary Term, 2 Will. 4, s. 68, one day's notice of motion for judgment as in case of a nonsuit can operate as a stay of proceedings in this Court? *Jones v. Howe*, 379

(4). *Entering of, nunc pro Tunc.*

The proviso in rule 3 of H. T. 4 W. 4, "that it shall be competent for the Court or a Judge to order a judgment to be entered *nunc pro tunc*," applies only, as formerly, to cases where it is delayed by the act of the Court. *Lanman v. Lord Audley*, 535

PRINCIPAL AND AGENT.

1. In an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were in fact ordered through a third party, M.:—*Held*, that the plaintiff was bound, in order to recover in the action, to prove that M. was employed by the defendant alone, or by the defendant and others, to give the order, and that the defendant in so employing M. was not acting as agent for any other person; or else that M. was a principal jointly with the defendant, or with the defendant and others: and that it would make no difference that the plaintiff, at the time, considered M. as authorized to contract on behalf of the candidate, if in fact he was not so authorized. *Thomas v. Edwards*, 215

2. Where a club was formed, subject to the following among other rules, viz. that the entrance fee of

admission should be ten guineas, and the annual subscription five guineas; that if the subscription were not paid within a certain limited period, the defaulter should cease to be a member; that there should be a committee to manage the affairs of the club, to be chosen at a general meeting; and that all members should discharge their club bills daily, the steward being authorized, in default of payment on request, to refuse to continue to supply them:—*Held*, that the members of the club, merely as such, were not liable for debts incurred by the committee for work done or goods supplied for the use of the club; for that the committee had no authority to pledge the personal credit of the members. *Fleming v. Hector*, 172

3. A., a broker, employed by B. to sell certain railway shares, agreed with C., D.'s broker, to sell him fifty shares, of which A. afterwards informed his clerk at his office, who made an entry in the book as of a sale from A. to C.; and a contract note to the same effect was sent to C. A. subsequently saw the entry in the book, and altered it by writing the name of B. as seller, and directed another note to be sent to C. with the name of B. as seller. A fresh note was accordingly sent the same evening or the next morning, but C. received them both together the next morning. C. did not return the first note, nor did A. request to have it returned. In an action brought by D. against A. for breach of the agreement, in not completing the sale, the learned Judge who tried the cause left it to the jury to say whether the second note was a correction of a mistake in the first, and told the jury that if the defendant entered into a written contract in his own name, he could not afterwards set up that he

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was acting as broker merely; and that, although known to be a broker, if he signed the contract in his own name, he was liable:—*Held*, that this was no misdirection. *Held*, also, that evidence that it was the custom in Liverpool to send in broker's notes without disclosing the principal's name, was properly rejected. *Magee v. Atkinson*, 440

PRISONER.

I. Discharge under 48 Geo. 3, c. 123.

1. A defendant remaining in execution twelve calendar months, for the nominal damages in ejectment, and the costs, is entitled to his discharge under the 48 Geo. 3, c. 123. *Doe d. Threlfall v. Ward*, 65

2. A defendant is not entitled to his discharge under the 48 Geo. 3, c. 123, unless he has been confined for the twelve months *within the walls of the prison*. *Gilbert v. Pape*, 311

II. Supersedeas.

1. *Semble*, that a rule nisi for a supersedeas, on the ground that the defendant had been in custody a month after he was supersedeable by reason of the plaintiff's not having declared in time, is no stay of proceedings, and the plaintiff may proceed, after service of such rule, to charge the defendant in execution. *Robinson v. Cresswell*, 410

2. Where the plaintiff declared against a prisoner in Hilary Term, and the cause was tried in the Vacation after, and final judgment was signed in Easter Term: *Held*, that by the Rule H. T., 2 Will. 4, s. 85, the plaintiff ought to have charged the defendant in execution in Easter Term; and not having done so, that the defendant was entitled to be discharged out of custody. *Foulkes v. Burgess*, 849

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PROBATE.

Covenant on a policy of insurance under seal, whereby three of the directors of the insurance company did order, direct, and appoint, that, if T. S., the insured, should die, &c., the capital, stock, and funds of the company should stand charged and be liable to pay the executors, administrators, and assigns of the said T. S., within three calendar months after his decease should be certified, the sum of 500*l*. The insured died in the diocese of Exeter, and the policy was in that diocese at the time of his death:—*Held*, that a probate from the diocesan court of Exeter was sufficient to enable the executors to recover on the policy, though the defendants resided, and all the stock and funds of the company were situate, in the diocese of London. *Gurney v. Rawlins*, 87

PROCESS.

Return of.

1. "The defendant is not to be found in my bailiwick," is a bad return to a writ of *capias*.

Negligence in the execution of mesne process is no ground for an attachment against a sheriff. *Rex v. Sheriff of Kent*, 316

2. If the sheriff levies and sells goods of a defendant under a *fieri facias*, and, after notice that the defendant has petitioned the Insolvent Debtors' Court, returns *fieri feci*, he is bound by that return, and must pay over the money to the plaintiff, although the defendant is afterwards discharged under the Insolvent Act. *Field v. Smith*, 388

RESTRAINT OF TRADE.

The plaintiff, by deed, sold to the defendants his trade and business as a carrier between London and Wis-

bech, and, in consideration of the covenants therein contained on the defendants' part, covenanted with them that he would not thenceforth, during his life, exercise the trade of a carrier, except as thereafter mentioned; and that he would thenceforth, during his life, faithfully serve the defendants as an assistant in the trade of a carrier: and the defendants, in consideration of the before-mentioned covenants, and of the plaintiff's faithful service as aforesaid, covenanted to pay him a certain weekly sum for his life. In an action against the defendants on this covenant:—*Held*, that the plaintiff's covenant to serve during his life was good in law, and that the covenant in restraint of his trade was not void, inasmuch as he was not absolutely restrained from carrying on the trade, but only from carrying it on in any other way than as an assistant to the defendants.

Quære, whether, supposing this covenant were void, as being in general restraint of trade, the plaintiff could nevertheless have sued on the defendants' covenant to pay? *Wallis v. Day*, 273

SCAVENGER.

Under the Metropolitan Paving Act, 57 Geo. 3, c. 29, ss. 59, 60, the scavenger of a particular district is entitled only to such dust, ashes, &c. as are, in the contemplation of the owner, rubbish or refuse, and as he desires to dispose of in that character.

Therefore, where brewers occupying premises in parish A., burnt coals there in the process of brewing, and when they were partially consumed by having passed once through the fires, removed them, intermixed with the dust and ashes arising from the same fires, to other premises occupied by them in parish B., where they used them for heating water to cleanse

their casks:—*Held*, that the scavenger of parish A. was not entitled to claim any of the articles so removed. *Filbey v. Combe*, 677

SEDUCTION.

Case. The declaration stated that one M. H., being the daughter and servant of the plaintiff, with the consent of the plaintiff, became the apprentice of one A., the wife of the defendant, for the term of two years, for the purpose of learning the business of a milliner, in consideration of 29*l.* paid by the plaintiff, and in consideration that the said A., with the consent of the defendant, should find and provide the said M. with meat, drink, and lodgings; nevertheless the defendant debauched her, whereby she became ill, and incapable of serving the said A., and of learning the said business, &c. &c.:—*Held* bad on demurrer. *Harris v. Butler*, 539

SHERIFF.

See ATTACHMENT.
BANKRUPTCY.
PLEADING.
PROCESS.

Semble, that a declaration against a sheriff for extortion in the execution of a fi. fa., must state the sum actually taken by him; and that it is not sufficient to allege that he took £— more than by the statute is allowed. *Ashby v. Harris*, 673

SHIP.

Trover for one-fourth of a ship. In the year 1833, and until his bankruptcy, one J. L. carried on business as a ship-builder; and on the 10th June, 1833, the following agreement was entered into:—"Particulars and description of a new ship now about one-third built in the yard of J. L.;" then there followed a description of the length, breadth, and depth of the ship, the number of tons she was to carry, and the timbers, and par-

ticulars of every thing that she was to be built of and supplied with, "for the sum of 1750*l.*, and payment as follows, opposite to each respective name." This agreement was signed by J. L.; and after his signature followed these words:—"We, the undersigned, hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by several persons for different shares and at different times, and, amongst the rest, by the plaintiff for one-fourth, in October 1833. Below these signatures was written the following:—"14th July, 1833—I hereby agree to accept the above price and mode of payment—J. L." The plaintiff proved payment for his share by bills before the bankruptcy of J. L. The T. C. Company signed the agreement for one-fourth, of which company one H. was a member, and used to go to look at the vessel when building, and occasionally found fault with the work, which was improved in consequence, and J. L. told his foreman to act under H.'s direction. At the time of the bankruptcy, the frame of the vessel was on the stocks in J. L.'s building-yard in an unfinished state, and, after the bankruptcy, some of the men continued to work upon her, and receive their money from H.:—*Held*, that, under these circumstances, the property in one-fourth of the vessel did not pass to T. L., the plaintiff. *Laidler v. Burlinson*, 602

SMUGGLING ACT.

In the beginning of 1832, A., then residing in England, entered into arrangements with B. for procuring a vessel for the purpose of smuggling tobacco in Ireland. The vessel was accordingly hired by them, and proceeded on her voyage in June, 1832; and having taken on board a cargo of

tobacco in the Flushing Roads, arrived and was unshipped at Cork on the 28th of July, 1833, without payment of the duties. An information was filed against A. on the 19th July, 1836, founded on the 6 Geo. 4, c. 103, s. 45, for assisting and being otherwise concerned in the unshipping of the tobacco, the duties not having been paid. A. was not proved to have taken any part in the transaction further than above stated:—*Held*, that he was not liable on this information in *England*. *Attorney-General v. Kenifeck*, 715

STAMP.

See GOODS SOLD AND DELIVERED.I. *Promissory Note*.

An instrument in the following form, "11th October, 1831. I. O. U. 20l., to be paid on the 22nd inst., W. B.," requires a stamp, either as a promissory note, or as an agreement for the payment of money above the value of 10l. *Brooks v. Elkins*, 74

II. *Agreement*.

An instrument in these terms—"I hereby certify that I remain in the house, No. 3, Swinton Street, belonging to W. G., on sufferance only, and agree to give him immediate possession at any time he may require:"—*Held*, not to amount to an agreement for a tenancy, so as to require a stamp. *Barry v. Goodman*, 768

STATUTE.

Effect of Repeal of.

1. By the 5 & 6 Will. 4, c. 50, the 13 Geo. 3, c. 78, which gave treble costs to parties sued for anything done in pursuance of the act, on a nonsuit, was repealed, the new act giving, in such case, costs only as between attorney and client. A plaintiff, who sued parish officers for an

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act done under the 13 Geo. 3, c. 78, became nonsuit at a trial which took place before the 5 & 6 Will. 4, c. 50, came into operation, but judgment was not signed till after:—*Held*, that the defendants were not entitled to treble costs. *Charrington v. Meatheringham*, 228

2. To a declaration for goods sold, the defendant pleaded, according to the 23 Geo. 2, c. 27, s. 8, (Westminster Court of Requests Act), that the defendant was indebted in a less sum than 40s., and that he was an inhabitant and resident within the city of Westminster. Replication, that the defendant was indebted in the sum of 40s. At the trial the jury found for the defendant. The statute 23 Geo. 2, c. 27, was repealed by 6 & 7 Will. 4, c. 137, after plea pleaded, and before trial:—*Held*, that the plaintiff was entitled to judgment non obstante veredicto. *Warm v. Beresford*, 848

STOCK-BROKER.

A broker cannot maintain an action for work and labour, and commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 16. *Cope v. Rowlands*, 149

STOCK-JOBGING ACT.

Time bargains in foreign funds are not within the prohibition of the Stock-jobbing Act, 7 Geo. 2, c. 28, nor illegal at common law. *Elsworth v. Cole*, 31

STOPPAGE IN TRANSITU.

1. A consignor of goods, who has received the acceptance of the consignee for part of the goods, may stop them in transitu on the consignee's insolvency, and retain possession of them, without tendering back the bill.

Goods were consigned to A., deliverable in the port of London at a certain price per ton. The vessel in which they were shipped arrived off the wharf at which the captain was in the habit of trading. The captain called at A.'s place of business, and saw B. his clerk, A. being from home, and pressed him to send a craft for the goods, or he should be under the necessity of landing them. After some days, B. wrote to the captain, stating that A. was from home, but he, B., thought he had better land the goods on A.'s account. They were accordingly landed at the wharf, and entered in the wharfinger's book, with "freight and charges," set opposite to them, and not in the name of any party as consignee. While they were lying there, A. became insolvent, and they were stopped by the consignor:—*Held*, that the transitus was not determined. *Edwards v. Brewer*, 375

2. Goods were consigned to A., deliverable in the river Thames: on the arrival of the vessel in the river the captain pressed A. to have them landed immediately; A., in consequence, sent B., his son, with directions to land them at a wharf where he was accustomed to have goods landed for him, and kept until he carted them away to his customers in his own carts; but A. (being then insolvent) at the same time told B. he would not meddle with the goods, that he did not intend to take them, and that the vendor ought to have them. The goods were, by B.'s direction, landed at the wharf, and there stopped in transitu by the vendor. In trover for the goods by the assignees in bankruptcy of A. against the wharfinger:—*Held*, that the declarations so made by A. to B. were admissible in evidence, although they were not communicated to the vendor or to the wharfinger; and that they shewed that A. had not taken posses-

sion of the goods *as owner*, and therefore that the transitus was not determined. [Lord Abinger, C. B., dissentiente.] *James v. Griffin*, 623

SUBPCENA.

See WITNESS, 1.

TENDER.

See Pleading, III. 7.

TOTHILL FIELDS' ACT.

Notwithstanding the provisions of the Vauxhall Bridge Act, 49 Geo. 3, c. 142, the occupiers of houses adjoining the Vauxhall Bridge Road, but lying within the limits of the Tothill Fields' Act, 6 Geo. 4, c. 134, are liable to the paving rate levied under the latter act. *Young v. Grove*, 703

TRESPASS.

1. Pleadings.

In trespass for assault and false imprisonment, the defendant pleaded that he was possessed of a shop, and carried on the business of a baker therein, and that the plaintiff had been in the shop making a great noise and disturbance, and abused the defendant, and disturbed him in the peaceable possession of his shop, *in breach of the king's peace*, and thereby obstructed the defendant in the exercise of his business; that the plaintiff went out of the shop into the public street in front of it, and continued there to make a great noise and disturbance, and to abuse the defendant, and thereby caused a great concourse of persons to assemble, and so disturbed the defendant in the possession of his shop, and obstructed his business, *in breach of the peace*, and thereby caused a great riot and disturbance; that the defendant requested him to desist and depart, but he refused, whereupon the defendant, *in order to preserve the peace*, sent

for certain policemen, and requested them to remove the plaintiff; that they requested the plaintiff to cease making such noise and disturbance, &c., but he refused, and continued making such noise, riot, and disturbance, &c.; whereupon the defendant, in order to preserve the peace, charged them with the plaintiff, and he was taken to a station-house, and thence before a magistrate, who admonished and discharged him:—*Held*, that, even without the allegation of riot, the plea disclosed a sufficient justification.

The evidence was, that the plaintiff, after abusing the defendant in his shop, went into the street outside, and there continued to abuse him; that a crowd of a hundred persons was collected, and the street much obstructed; that the defendant sent for the police, who, on the plaintiff's refusing to go away, took him to the station-house, and before a magistrate, as stated in the plea:—*Held*, that these facts amounted to a breach of the peace, and justified the defendant in directing the imprisonment. *Cohen v. Huskisson*, 477

II. Justification of, for Removal of Goods.

If A. wrongfully place goods in B.'s building, B. may lawfully go upon A.'s close adjoining the building, for the purpose of removing and depositing the goods there for A.'s use. *Rea v. Sheward*, 424

TROVER.

See PLEADING, III., 6, 9.

I. Pleadings.

1. In trover, since the new rules, the plaintiff is entitled to a verdict on the plea of not guilty, if after trial a conversion in fact be proved, although it appear from the evidence, that at the time of such conversion the plain-

tiff had parted with his property in the goods. *Vernon v. Shipton*, 9

2. Trover by the assignee of A., an insolvent, for ten sets of harness, ten horses, &c. The defendant pleaded that the plaintiff, as assignee, was not lawfully possessed of the goods, &c. as of his own property as assignee; and also a plea stating that before the insolvent petitioned for his discharge, the defendant sold and delivered to him divers horses and harness, being the same as those mentioned in the declaration, for 150*l.*, on the terms that the defendant might at any time, until payment of the price, take and retain the horses and harness as a pledge and security for such part of the price as should remain unpaid, until payment thereof; that at the time of the alleged conversion, 22*l.*, part of such price, remained due; and that after the plaintiff became possessed as assignee, the defendant took the said horses and harness into his possession as such pledge and security, &c.; which is the conversion in the declaration mentioned. To this plea the plaintiff new assigned, that the action was brought, not for the supposed conversion in the plea mentioned, but for the conversion of ten sets of harness, ten horses, &c., other than and different to those in the plea mentioned, &c.; to which the defendant pleaded not guilty:—*Held*, that the plaintiff was entitled, under the new assignment, to give in evidence a conversion by the defendant of *five* horses, two of which were, and three were not, the subject of the agreement stated in the plea. *Bolton v. Sherman*, 395

II. Conversion.

A vessel, having run ashore on the coast of Essex, was assisted by the owner of a smack, who put down an anchor and a hawser attached to the

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vessel for the purpose of securing her. The smack then left her for the purpose of carrying away some of her stores, with the intention however of returning. The owner of another smack came to her afterwards, and finding no one in or near the vessel, and her deck under water, took away the anchor and hawser, and delivered them up to the deputy vice-admiral of Essex:—*Held*, that the anchor and hawser were not parted with, or left and abandoned, within the meaning of the 1 & 2 Geo. 4, c. 75, s. 1; and that the deputy vice-admiral was not justified in detaining them until salvage was paid, or security given for its payment.

The deputy vice-admiral, who received the anchor and hawser, alleged to have been *left* at sea, from the finder, refused, on application by the real owner, to deliver them up until the salvage was paid, or security given for the payment of it:—*Held*, that this was a conversion; but that, if he had merely refused to deliver them up until it was ascertained whether salvage was due or not, it would not have amounted to a conversion. *Clark v. Chamberlain.* 78

III. When maintainable for Fixtures. See FIXTURES.

VICE-ADMIRAL'S JURISDICTION.

See TROVER, II.

VAUXHALL BRIDGE ACT.

See TOTHILL FIELDS' ACT.

WITNESS.

I. Attachment for disobeying Subpœna.

1. An affidavit to ground a rule nisi for an attachment for not obeying a subpœna, must state that at the time of the service the original subpœna

WITNESS.

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was shewn; and it is a sufficient answer to such a rule that the affidavit does not so allege. *Garden v. Creswell,* 319

2. In order to ground a motion for an attachment for disobedience to a writ of subpœna ad testificandum, the affidavit must state that the party was a material witness. *Tinley v. Porter,* 822

II. Competency.

1. On A. and B. entering into partnership, A. borrowed a sum of money of C., for which he gave her his promissory note, payable six months after demand. A. and B. subsequently dissolved partnership, and C. gave A. notice to pay the note, and afterwards indorsed it to B., who continued the business. In an action by A. against B. on a covenant in the deed of dissolution for the payment of a sum of money to A., B. set off the note. C. being called as a witness for B. to prove the loan to A., the demand of payment, and the delivery of the note to B., stated on the voir dire, that she did not wish to take the money out of the business: that she considered the note to belong to B., but expected her principal and interest:—*Held*, that she was a competent witness, for that B.'s liability on his engagement to her was wholly independent of the result of the action. *Hatcher v. Seaton,* 47

2. In an action for work done to a vessel against one part owner, another part owner is a competent witness for the defendant, after a release. *Jones v. Pritchard,* 199

3. To an action brought by the vestry clerk of the parish of St. Pancras, under a local act, the defendant pleaded that the plaintiff was not vestry clerk:—*Held*, that evidence of his acting as vestry clerk was sufficient *primâ facie* evidence of his appointment. *Held* also, that one of the directors of the vestry was a competent

witness for the plaintiff. *M'Gahey v. Alston*, 206

4. In an action on the case for negligence in driving by the defendant's servant:—*Held*, that since the 3 & 4 Will. 4, c. 42, the servant is a competent witness for the defendant without a release, his name being indorsed on the record. *Yeomans v. Legh*, 419

WRIT OF ERROR.

Supersedeas.

1. The notice of allowance of a writ of error precludes the plaintiff from charging a defendant in execution, though the defendant's affidavit does not state the grounds of error, or that bail has been duly put in. *Marston v. Halls*, 60

2. The new rules of H. T. 2 Will. 4, s. 83, and H. T. 4 Will. 4, s. 9, do not apply to errors in fact; a writ of error coram vobis is therefore a supersedeas from the time of notice that it is sued out, not from the time of allowance only.

The 6 Geo. 4, c. 96, s. 1, requiring bail in error, does not apply to errors in fact. *Levy v. Price*, 533

WRIT OF PRIVILEGE.

A general writ of privilege operates merely as a notice that the party is entitled to the privilege of the court, and does not operate as an injunction; and therefore it is irregular to move to set it aside, even though it is sued out in a case in which the officer is not entitled to privilege. *In re Robert Thompson*, 645

WRIT OF TRIAL.

1. *Semble*, that the court will not set aside a trial before the sheriff, on the ground that the case was not within the 3 & 4 Will. 4, c. 42, s. 17,

WRIT OF TRIAL.

at the instance of the party who obtained the order for the writ of trial.

The first count of the declaration stated, that in consideration that the plaintiff would send a pony to the defendant, and would sell and deliver it to A., the defendant undertook that he was authorized by A. to purchase it on his behalf; that the plaintiff sent the pony to the defendant, and was willing to sell it to A., but that the defendant had no authority from A. to purchase it. The second count was a similar one, but stating that the defendant himself undertook to purchase the pony. There was also an indebitatus count for a pony sold and delivered:—*Held*, that this was a record which might be sent by writ of trial before the sheriff, under the 3 & 4 Will. 4, c. 42, s. 17. *Price v. Morgan*, 53

2. The court held that an undersheriff was justified in laying down a rule, that no person but a barrister, or an attorney, should appear as the advocate of a party on a writ of trial. *Tribe v. Wingfield*, 128

3. The Court refused to grant a rule for a new trial in a case before the sheriff, where the damages were under 5*l.*, although the evidence appeared to shew that it was one of several actions brought by different plaintiffs against the same defendant for aliquot parts of a sum of money exceeding 5*l.*, which ought to have been sued for in one joint action by all those plaintiffs, being due under one entire contract by the defendant with them all. *Williams v. Evans*, 220

4. Where the date of the writ of summons was untruly stated in a writ of trial, the Court set aside a verdict which the plaintiff had recovered thereon, the defendant not having appeared at the trial. *White v. Farrar*, 288

5. Where the verdict, in a cause

